88-1687

Supreme Court, U.S.
FILED
APR 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRY S. DOOLEY,
Petitioner,

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT and
H. RICHARD O'NEAL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER INTENTIONAL RACIAL DISCRIMINATION MUST BE ESTABLISHED IN ORDER TO PROVE A RETALIATION CLAIM UNDER SECTION 704 OF THE CIVIL RIGHTS ACT OF 1964 WHICH WAS THE LEGAL STANDARD APPLIED BY THE COURT OF APPEALS.

II.

WHETHER THE FOURTEENTH AMENDMENT, PROCEDURAL DUE PROCESS CLAUSE, IS VIOLATED WHEN A TENURED PUBLIC SCHOOL TEACHER IS DEMOTED FROM A TEACHING POSITION TO A NON-TEACHING, NON-PROFESSIONAL POSITION INSPECTING BUS PARTS, WITHOUT NOTICE OR A REASONABLE OPPORTUNITY TO BE HEARD.

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NO. _____

IN THE

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OCTOBER TERM, 1988

HENRY S. DOOLEY,
Petitioner,

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT and
H. RICHARD O'NEAL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioner[1] respectfully prays that a Writ of Certiorari issue to review the January 17, 1989 unpublished opinion and judgment of the United States Court of Appeals for the Fifth Circuit and the Fifth Circuit's February 13, 1989 *per curiam* denial on Petition for Rehearing, entered in the above civil action.

1. Petitioner herein is Henry S. Dooley.

OPINIONS BELOW

The unpublished opinion and judgment of the United States Court of Appeals for the Fifth Circuit were each filed January 17, 1989. The per curiam denial on Petition for Rehearing was filed February 13, 1989. Copies of the Appeals Court's January 17, 1989 opinion and judgment and per curiam denial are included in Appendices B, C, D and E, together with a copy each of the Trial Court's memorandum opinion and Order, Appendix F, filed December 9, 1987.

GROUNDS OF JURISDICTION

The Judgment and Opinion sought to be reversed was entered by the United States Court of Appeals for the Fifth Circuit on January 17, 1989, affirming the District Court's judgment and order in all respects. The per curiam denial on Petition for Rehearing was entered by the Fifth Circuit on February 13, 1989. This Petition for Writ of Certiorari was filed within ninety days of that denial or Petition for Rehearing date.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amendment 14

42 U.S.C. Sec. 1983

42 U.S.C. Sec. 2000e

STATEMENT OF THE CASE

Petitioner brought this civil action pursuant to the United States Constitution and Title VII of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000e, *et seq.*), and Title 42, United States Code, Section 1983. Moreover, this civil action arose out of the employment decisions made by Respondent and relative to Petitioner which Petitioner under the circumstances alleges are racially discriminatory.

Petitioner began his employment with Respondent school district as a "teacher" in August, 1967 under a series of yearly contracts and was employed hereafter in the same position up to and including August 24, 1970. On August 24, 1970, Petitioner began his employment with Respondent under a "continuing contract of employment" until his termination at the end of the 1984-85 school term.

During the 1984-85 school year, Petitioner was assigned to teach sixth grade physical education and had the additional duty of coaching boys' athletics at one of the Respondent School District Middle Schools. While at this middle school, Petitioner was suspended and subsequently stripped of his coaching duties for an alleged tackling incident involving an eighth grade student athlete during football drills. This was the first disciplinary action taken against Petitioner in over 16 years of the Respondent District and in his 27 plus years as a teacher/coach. Prior to Petitioner's suspension and loss of coaching status, Petitioner had filed and proceeded to trial on "failure to promote based on race" case in March, 1984. At and around this same time, Petitioner was transferred to the "Transportation Department", motor pool and away from

other teacher assignments including those teacher positions, permanent and substitute, which existed. Petitioner did not receive anything specific in writing as to the reasons why he was assigned out of the teaching pool into the Transportation Department motor pool. The difference in assigned duties were drastic, totally unrelated to and inconsistent with and not contemplated by the continuing contract of employment under which Petitioner and Respondents were operating. (*See* First Amended Original Complaint, pp. 42a-43a in Appendix G, below.)

Petitioner has filed numerous charges of discrimination (approximately 20 with the Equal Employment Opportunity Commission) prior to his reassignment to the Transportation Department motor pool. Subsequent thereto, Petitioner received notification of his reassignment to teach science classes for the 1984-85 school year. At the same time, Petitioner received a form distributed by Respondent School District that there were two (2) or three (3) different schools in need of Physical Education teachers, with his area of experience and knowledge. Petitioner was not assigned to any of the physical education openings but was assigned as a "floating teacher" which required him to move all of his science class materials around on a cart from class to class and up and down stairs and this assignment included two (2) science honor classes. Moreover, the assignment was arbitrary and capricious in as much as the principal had no knowledge of Petitioner's teaching abilities in science and did not review Petitioner's personnel file or transcript. Further, the lack of good faith and improper motive for Petitioner's suspension, transfer to wholly unrelated areas of instruction and subsequent termination was absolutely

manifest by the facts that three (3) other competent science teachers were available for assignment to said science teacher position, that Petitioner was the first instance where the principal had recommended a teacher for termination and that it "was common knowledge in the Fort Worth Independent School District" that Petitioner had filed a number of complaints about Respondent school district's promotion practices. At the time of Petitioner's transfer to the menial positions in the Transportation Department and other teaching positions for which he was not certified or qualified to teach, the Respondent school district calculated that Petitioner would "washout" in terms of performance appraisals. (*See* First Amended Original Complaint, p. 43a, Appendix G, below).

After being notified of his nonrenewal in March, 1985, Petitioner was then transferred in the middle of the school year from teaching science to teaching Physical Education. A similar transfer could not be accomplished the previous year, according to the Respondent's School District resulting in Petitioner being reassigned to the Transportation Department motor pool. At the end of 1984-85 school year, Petitioner's employment with the Fort Worth Independent School District and as a teacher ended after 29 years.

REASONS FOR GRANTING THE WRIT

A. A Writ of Certiorari should be granted to review the questions presented which concern whether the Fifth Circuit applied the correct legal standard to Petitioner's retaliation claim against Respondent based on Petitioner's prior charges of discrimination and continuous opposition to alleged discriminatory practices by Respondent.

B. Petitioner would show this Court that the Fifth Circuit's affirmance of the trial Court's judgment results in an illogical, implausible and inconsistent determination violative of the Due Process clause of the Fourteenth Amendment.

C. A Writ of Certiorari should be granted to review the question presented as to whether, under the facts and circumstances of this case, the Petitioner had a liberty or property interest in a "classroom teaching assignment" consistent with his training and experience when such positions are clearly otherwise open and available. In this regard, the Fifth Circuit Court of Appeals noted that certain language in Petitioner's contract allowed Petitioner's assignment from the classroom to "greasing and inspecting" vehicles in the Transportation Department's motor pool. Petitioner alleges that the Fifth Circuit's construction of this clause (Paragraph 4) is clearly erroneous and an abuse of discretion. Petitioner asserts that the Fifth Circuit's construction of that Paragraph 4 of the continuing contract of employment misapprehends the scope and extent of the matters contemplated by the parties at the time the contract was signed. (*See* Appellant's Petition for Rehearing, Appendix M, below.) Petitioner asserts that the Fifth Circuit abused its discretion in not finding a due process violation from Respondents' actions in reassigning (demoting) Petitioner from a classroom setting to greasing and inspecting cars without notice and an opportunity to be heard. This is an entirely different matter from the loss of Petitioner's coaching assignment for which due process procedure was afforded.

D. The Fifth Circuit's decision is contrary to the treatment by other circuits relative to retaliation claims.

E. The Fifth Circuit's opinion and judgment has burdened Petitioner with additional punishment not contemplated by Respondent school district. The Fifth Circuit justified punishment of Petitioner for "misconduct." On the record, there is clearly no basis for the Fifth Circuit's determination which is clearly erroneous and an abuse of discretion.

F. The Fifth Circuit abused its discretion in affirming the trial court's denial of a trial by jury as to the due process issue raised in the civil action below.

THE DECISION BELOW IS INCORRECT AND AGAINST FEDERAL CIVIL RIGHTS POLICIES ON EMPLOYMENT RETALIATION AND DUE PROCESS

The Fifth Circuit has continued to hold that it is only necessary that an employee believe, in good faith, that the employment practice he opposes violated Title VII. *DeAnda v. St. Joseph Hospital,* 671 F.2d 850, 28 FEP 317 (5th Cir. 1982). Under Sec. 704(a) of Title VII, *claims of retaliatory conduct do include demoting the plaintiff to a lower position and removing him to another location. Clemente v. United States,* 568 F.Supp. 1150, 36 FEP 1716 (C.D. Cal. 1983) (moved to another office). Most courts have utilized a three-pronged burden of proof for establishing a prima facie case of retaliation: (1) the employee engaged in a protected activity; (2) the employee was subjected to an adverse employment decision; and (3) there is a causal connection between

(1) and (2). *DeAnda v. St. Joseph Hospital, supra.* Under *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), *or Lindsey v. Mississippi Research and Development Center,* 652 F.2d 488 (5th Cir. 1981) analysis, a plaintiff may establish by direct evidence of retaliation or *circumstantial evidence sufficient to infer* a retaliatory adverse employment action. *Evidence that an employee was treated differently from employees who had not engaged in protected activity* has been held *sufficient to establish the causal connection.* If an employer treats an employee differently after learning that the employee has engaged in protected activity, that difference in treatment is sufficient to establish a causal connection between the protected activity and the adverse personnel action. *Capaci v. Katz & Bestoff, Inc.,* 525 F.Supp. 317, 30 FEP 1541 (E.D. La. 1981), *aff'd in part, rev'd in part,* 711 F.2d 647, 32 FEP 961 (5th Cir. 1983), *cert. denied,* 466 U.S. ____ (1984). A short period of time between the protected activity and the adverse personnel action complained of may infer a causal connection. *Ferguson v. E.I. du Pont de Nemours & Co.,* 560 F.Supp. 1172, 31 FEP 795 (D. Del. 1983).

In a school setting, "demotion" has been defined as any reassignment under which the staff member receives less pay or has less responsibility than under the assignment to be held previously, or which requires a lesser degree of skill than did the assignment he held previously. *Carter v. West Feliciana School Board,* 396 U.S. 290, 90 S. Ct. 608, 24 L.Ed.2d 477 (1970), *on remand,* 425 F.2d 1211 (5th Cir. 1970) (per curiam). In determining whether, in a school setting, a "demotion" has occurred, the central value to be protected is responsibility; salary

and title are not necessarily determinative. *Lee v. Russell County Board of Education,* 563 F.2d 1159, 1161 (5th Cir. 1977). To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it; he must have more than a unilateral expectation of it and, instead, must have a legitimate claim of entitlement to it. *Board of Regents of State College v. Roth,* 408 U.S., at 577, 92 S. Ct. at 2699. The sufficiency of a claim of entitlement must be decided by reference to state law. *United Steelworkers of America, AFL-CIO v. University of Alabama,* 599 F.2d 56, 60 (5th Cir. 1979), *citing Bishop v. Wood,* 426 U.S. 341, 344, 96 S. Ct. 2074, 2077, 48 L.Ed.2d 684 (1976). When a constitutional interest is at stake, the Plaintiff is entitled to procedural due process protection in conjunction with being deprived of that interest; the due process protection that must be accorded consists of notice and an opportunity for a hearing. *Goss v. Lopez,* 419 U.S. 565, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975); *Morrissey v. Brewer,* 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972); *Goldberg v. Kelly,* 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970); *Sniadach v. Family Fin. Corp.,* 395 U.S. 397, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1969).

Timing and content of the notice and hearing which are constitutionally sufficient in a particular set of circumstances are determined by a balancing of individual and governmental interest. *Morrissey v. Brewer, supra; Glenn v. Newman,* 614 F.2d 467, 472 (5th Cir. 1980); *compare Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976) *with Goldberg v. Kelly, supra.*

Opportunity for a hearing must be provided "before the nonrenewal of a public school employee if the decision deprives the employee of a protected liberty or property interest." *Gosney v. Sonora Independent School District,* 603 F.2d 522 (5th Cir. 1979), at 525 (emphasis added), *citing Board of Regents v. Roth,* 408 U.S. 564, 569, 92 S. Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); *Perry v. Sinderman,* 408 U.S. 593, 599, 92 S. Ct. 2694, 2698, 33 L.Ed.2d 570 (1972); *Stapp v. Avoyelles Parish School Board,* 545 F.2d 527, 532-35 (5th Cir. 1977). In cases where a hearing may occur subsequent to infringement of a protected interest, the hearing must be held promptly and before extended deprivation. *Goss v. Lopez, supra; Arnett v. Kennedy,* 416 U.S. 134, 94 S. Ct. 1633, 40 L.Ed.2d 15 (1974) (plurality opinion); *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed 2d 656 (1973); but see *Ingraham v. Wright,* 430 U.S. 651, 97 S. Ct. 1401, 51 L.Ed.2d 711 (1977).

The reassignment of Petitioner from a teaching position to performing manual labor, inspecting buses and parts, in the Transportation Department was a demotion. Petitioner certainly had fewer responsibilities in the Transportation Department such as no classroom teaching, no grading of students, no interaction with other faculty members and school district administration concerning improvement of the education of the children in the district. Clearly, there was a reduction in responsibilities. Equally evident in the reassignment of Petitioner was that working in the Transportation Department required a lesser degree of skills than working as a teacher. Moreover, Petitioner had a legitimate claim of entitlement to his teaching position. His contract does not contemplate a reassignment to a non-teaching, non-professional posi-

tion. The applicable state law, Texas Education Code, Sec. 13.106 provides for continuing teacher contracts and which serves as the source of the legal claim of entitlement of Petitioner to a *teaching, professional* position. Therefore, Petitioner was entitled to notice and an opportunity to be heard in the instant fact situation where Petitioner was being deprived of a property interest in the employment as a teacher and for which he had a legitimate claim of entitlement. No such notice or opportunity to be heard was afforded to Petitioner. Petitioner's transfer to a *teaching* position in the spring of 1985, after being notified of his non-renewal as a teacher, clearly demonstrates that the school district *could have* transferred Petitioner to a teaching position. Respondent school district violated its own policies and procedures when it failed to afford Petitioner notice of the demotion. The opportunity to be heard which must and should have been afforded to Petitioner at a meaningful time, and in this instant fact situation, should have been afforded *prior* to the actual transfer to the Transportation Department. Nor was Petitioner afforded a prompt and meaningful post-deprivation hearing. The humiliation and embarrassment suffered by Petitioner as a result of this constitutional deprivation cannot be minimized because the transfer lasted a "mere" 2-3 months. The Petitioner had been a school teacher in the school district for over 18 years, and had been a good performer. He was well-known in the community as a teacher and coach. Surely, an argument that the 2-3 months deprivation was "minimal" is without merit.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

CLERK'S DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HENRY S. DOOLEY,
Plaintiff

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT,
Defendant

NO. CA-4-85-84 E

11/25/85: CONSOLIDATED WITH CA-4-85-725 E.

All future filings to be entered in CA4-85-84E

(Filed December 9, 1987)

Cause:

JURISDICTION IS CONFERRED UPON THIS COURT BY 42 U.S.C. § 2000(e)(f) AND BY 28 U.S.C. § 1343, 42 U.S.C. § 1983, AND THE 14TH AMENDMENT OF THE U.S. CONSTITUTION — CIVIL RIGHTS: JOBS blb

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Filing Fees Paid:

2/5/85	#67442	$60.00
1/5/88	#086566	$105.00 (Pltf.)

DOCKET ENTRIES

Date	NR.	Proceedings
1985		
2-5	1	Filed COMPLAINT (issued 1 summons with notice & complaint attached) (blb) (4 pgs)
3-8	2	Filed Defendant's ANSWER to Plaintiff's Original Complaint (blb) (6 pgs)
4-8	3	Filed ORDER: Discovery to be completed October 25, 1985. Pre Trial conference set for November 12, 1985 at 11:30 A.M. Trial: jury week-December 2, 1985 at 9:00 a.m. non jury week-December 9, 1985 at 9:00 a.m. Attys of record notified (dktd 4/9/85) (dd) (1 pg) EBM
11-12	4	PRE-TRIAL ORDER. Attorneys estimate that this case can be tried in approximately 3 days. The parties reserve the right to amend this order as required or permitted by the Court. (9) Dkd 11/12/85 AHMcG/ja
11-20	5	MOTION AND BRIEF TO CONSOLIDATE RELATED CASES (Deft) (3) blb
11-25	6	RESPONSE IN OPPOSITION TO MOTION AND BRIEF TO CONSOLIDATE RELATED CASES (Pltf) (2) blb
11-25	7	ORDER OF CONSOLIDATION . . . Court ORDERS that the above-styled and numbered causes - CA-4-85-84E and

Date	NR.	Proceedings
		CA-4-85-725E be consolidated. All future pleadings shall bear the cause number CA-4-85-84E Plf's applicaton for a preliminary and permanent injunction will be addressed at trial on 12/16/85. (2) Dktd 11/25/85. Cys to Attorney EBM/ja
12-8	8	*ANSWER* TO ORIGINAL COMPLAINT (Defts) (9) blb
12-10	9	MOTION TO WITHDRAW AS COUNSEL (Pltf's counsel) (3) blb
12-10	10	MOTION AND BRIEF FOR STAY, PENDING ADMINISTRATIVE DECISION (Defts) (5) blb
12-10	11	MOTION FOR CONTINUANCE (Defts) (3) blb
12-12	12	ORDER (1) Dktd 12/13/85 that Donald J. Fleming is permitted to withdraw and is relieved of any further responsibility for the prosecution of this cause. Cys to cnsl & Pltf EBM/dd
12-12	13	ORDER (1) Dktd 12/13/85 that plaintiff furnish the Court with the name, address and telephone number of his replacement counsel on or before January 13, 1986. Cys to all parties EBM/dd
12-12	14	ORDER GRANTING STAY PENDING ADMINISTRATIVE DECISION (1) Dktd 12/13/85

Date	NR.	Proceedings
		that the parties to this action be responsible for notifying this Court immediately upon receipt of a final decision from the Commissioner of Education for the State of Texas regarding Plaintiff's appeal of the Defendants' decision to terminate plaintiff as a teacher in the Defendant's school district. Cys to all parties EBM/dd
1986		
3-10	15	ORDER (1) Dktd 3/10/86 Discovery deadline: March 9, 1987. Pre trial conference: March 23, 1987 at 11:30 a.m. Trial - If Jury the week of April 6, 1987. If Non Jury the week of April 13, 1987. Cys to cnsl EBM/dd
5-9	16	ORDER (1) Dktd 5/9/86 on December 13, 1985 the Court issued an order instructing plaintiff to furnish the Court with the name, address and telephone number of his replacement counsel on or before January 13, 1986. The Court was recently informed by Mr. Donald Hill that he is unable to take plaintiff's case, thus plaintiff remains without counsel . . . The Court orders plaintiff to furnish the Court with the name, address and telephone number of his new counsel on or before June 5, 1986. The Court has been patient with plaintiff while he is attempting to obtain counsel; however, the Court will not tolerate any further delay in the prose-

Date	NR.	Proceedings
		cution of this action because of plaintiff's failure to obtain counsel. Cys to all parties. EBM/dd
6-6	17	ENTRY OF APPEARANCE (for Plaintiff) (2) ds
1987		
2-24	18	MOTION FOR LEAVE OF COURT TO FILE DEFTS' FIRST AMENDED ANSWER TO PLTF'S ORIGINAL COMPLAINT (Defts) (3) rjc
2-24	19	MOTION AND MEMORANDUM OF AUTHORITY TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL (3) rjc
3-5	20	MOTION FOR LEAVE TO AMEND (PLTF) (2) eb
3-5	21	BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO AMEND (PLTF) (2) eb
3-5	22	MOTION FOR LEAVE TO FILE JURY DEMAND (PLTF) (2) eb
3-5	23	BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE JURY DEMAND (PLTF) (3) eb
3-5	24	NOTICE OF DEPOSITION OF I. CARL CANDOLI ON 3/9/87 AT 10:00 O'CLOCK IN FORT WORTH, TEXAS (2) (PLTF) eb

Date	NR.	Proceedings
3-5	25	NOTICE OF DEPOSITION AND SUBPOENA DUCES TECUM ON 3/9/87 AT 9:00 A.M. IN FORT WORTH, TEXAS (PLTF) (3) eb
3-10	26	ORDER (1) Dktd 3/11/87 plaintiff's are granted leave to file First Amended Original Complaint . . . the filing of this amended complaint will not be grounds for a delay in the trial of this case. Cys to cnsl EBM/dd
3-10	27	PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT (13) dd
3-10	28	ORDER (1) Dktd 3/11/87 defendants are allowed to file their First Amended Answer to Plaintiff's Original Complaint . . . the filing of this amended answer will not be grounds for a delay in the trial of this case. Cys to cnsl EBM/dd
3-10	29	DEFENDANTS' FIRST AMENDED ANSWER TO PLAINTIFF'S ORIGINAL COMPLAINT (32 with attachments) dd
3-13	30	MOTION FOR LEAVE OF COURT TO FILE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DEF) (3) eb
3-19	31	PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR LEAVE TO FILE MOTION FOR SUMMARY JUDGMENT (2) rjc

Date	NR.	Proceedings
3-19	32	ORDER (1) (Dktd 3-20-87) . . . Defendant's motion for leave of court to file motion for summary judgment is DENIED. The Court will address all issues at a trial on the merits. Cys to counsel. EBM/rjc
3-24	33	DEFENDANTS' SECOND AMENDED ANSWER TO PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT (36) eb
3-27	34	PRETRIAL ORDER (23) conference held before U.S. Mag. McGlinchey this day . . . no pending jurisdictional matters . . . plaintiff's Motion for Leave to Demand Jury Trial and deft's Motion to Strike plaintiff's Demand for Jury trial is pending . . . plaintiff submits that he was terminated as a teacher, that deft's conduct constitutes a violation of the 14th Amendment of the Constitution and Title VII of the Civil Rights Act . . . defendant contends that no discriminatory action was taken against plaintiff . . . estimated length of non jury trial is 5 days . . . parties reserve the right to amend this order as required or permitted by the court. AHMcG/d
3-30	35	ORDER (2) Dktd 3/31/87 the court denies plaintiff's motion for jury trial. This case remains set on the April 13, 1987 docket. Cys to cnsl EBM/dd

Date	NR.	Proceedings
4-7	36	PROPOSED CONCLUSIONS OF LAW (DEF) (8) eb
4-7	37	DEFENDANT'S PROPOSED FINDINGS OF FACT (DEF) (11) eb
4-7	38	DEFENDANT'S LIST OF WITNESSES (2) eb
4-10	39	DEFENDANTS' EXHIBIT LIST (8) eb
4-13	40	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (PLTF) (11) eb
4-13	41	WITNESS LIST (PLTF) (2) eb
4-13	42	EXHIBIT LIST (PLTF) (3) eb
4-13	43	MINUTE ORDER (1) Atty Donald Hill for plaintiff and Tom Carr for defendant present before this court for commencement of non jury trial . . . opening statements made by counsel . . . testimony heard from plaintiff Henry Dooley and Molly Lassiter . . . testimony began on T. H. Simmons . . . court recesses until 9:00 a.m. dd
4-15	44	MINUTE ORDER (1) Non jury trial continues . . . court hears testimony from Carlos Puente, Arthur Pena, Ronnie White, James Willingham, Don Ponder and Bernum Robinson . . . court recesses until 8:30 a.m. for trial. dd

Date	NR.	Proceedings
4-15	45	ORDER (1) Dktd 4/15/87 plaintiff's action against defendant H. Richard O'Neal, individually and as President of the Fort Worth School Board is dismissed with prejudice. Plaintiff is to take nothing from defendant H. Richard O'Neal. Cys to cnsl EBM/dd
4-15	46	MINUTE ORDER (1) Non jury trial continues . . . court hears testimony from Margaret Walton; from Henry Dooley, pltf, on issues of damages; testimony of Joe Young . . . plaintiff rests subject to the availability of Dr. Williams as a factual witness . . . defendant moved for a Direct Verdict. The court carried along defendant's motion for directed verdict with respect to FWISD and granted defendant's Motion for directed verdict with respect to Dr. H. Richard O'Neal. A corresponding order was entered . . . defense began their case . . . testimony heard from Joe Ross, Gus Whitted, Dr. Sharah Jones and Bruce Wycoff . . . defense rested . . . court recesses until 9:00 a.m. dd
4-16	47	MINUTE ORDER (1) Non jury trial continues . . . plaintiff closes . . . defendant closes . . . both parties gave closing arguments with particular attention to plaintiff's transfer to the transportation department in March 1984 . . .

Date	NR.	Proceedings
		any amended findings of facts or conclusions of law to be submitted on April 27, 1987 . . . trial concluded. dd
4-27	48	PROPOSED SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (DEF FORT WORTH ISD) (6) eb
4-28	49	AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (PLTF) (12) eb
12-9	50	MEMORANDUM OPINION (16) Dktd 12/10/87 Dooley has failed to prove, by a preponderance of the evidence, that his rights under the Due Process Clause of the United States Constitution were violated. Dooley has also failed to make out a prima facie case for race discrimination, desparate treatment, or retaliatory action under Title VII of the Civil Rights Act of 1964. Such failure likewise precludes recovery on Dooley's section 1983 and 1981 claims. Accordingly, Dooley's request for relief under the Constitution, Title VII, and Sections 1983 and 1981 is denied. A judgment will be entered consistent with this opinion. Cys to cnsl EBM/dd

Date	NR.	Proceedings
12-9	51	JUDGMENT (1) Dktd 12/10/87 plaintiff Henry S. Dooley take nothing, that the action be dismissed on the merits, and that each party bear its own costs of action. Cys to cnsl EBM/dd
12-29	52	NOTICE OF APPEAL (Pltf) (1) from Memorandum Opinion and Judgment entered on Dec. 9, 1987. (Dktd 1-4-88) Fee paid. T.O. mailed. Cy to Judge. rjc
1988		
1-4		Mailed cert. copies of Notice of Appeal and docket entires to USCA5. Cys to counsel. rjc
1-21	53	MOTION AND BRIEF FOR ATTORNEYS' FEES SUBMITTED BY DEFTS FORT WORTH INDEPENDENT SCHOOL DISTRICT AND DR. H. RICHARD O'NEAL (32) lt
6-1	54	TRANSCRIPTS OF TRIAL PROCEEDINGS - Vols. I-IV. Ct. Reporter, Ana Ortega. Dates of Trial: April 13-16, 1987. rjc
6-8		Mailed ORIGINAL RECORD to USCA5 consisting of 3 Vols. of Record, 4 Vols. of Transcripts and 2 Envelopes of Exhibits. rjc

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1021

HENRY S. DOOLEY,
Plaintiff-Appellant,

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(February 13, 1989)

Before POLITZ and JOLLY, Circuit Judges, and HUNTER,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ E. GRADY JOLLY
United States Circuit Judge

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* District Judge of the Western District of Louisiana, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

January 17, 1989

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 88-1021 —
Dooley vs. Fort Worth Independent School District

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. *A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.*

Criminal Appeals. Local Rule 41 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal* appeal filed under FRAP 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

Court-Appointed Counsel Cases. This Court's plan under the Criminal Justice Act provides that in the event of affirmance or other decision adverse to the party represented, appointed counsel shall promptly advise the party in writing of the right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court and shall file such petition if requested to do so in writing by such party.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By: /s/ BETTY G. MARTINEZ
Deputy Clerk

Enclosure

Mr. Donald W. Hill
Mr. Tom Carr

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1021

HENRY S. DOOLEY,
Plaintiff-Appellant,

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

(January 17, 1989)

Before POLITZ and JOLLY, Circuit Judges, and HUNTER,* District Judge.

PER CURIAM:**

The plaintiff raised various issues on appeal, including whether the district court erred in finding that Henry S.

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* District Judge of the Western District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Dooley failed to establish his retaliation claim, and whether the district court abused its discretion in denying the appellant's demand for a jury trial. However, at oral argument this appeal was narrowed to the sole issue of whether plaintiff was denied due process when the Fort Worth Independent School District, after a disciplinary hearing that complied with due process, assigned him to the transportation department rather than to another classroom assignment. It is evident that the defendant had no liberty or property interest in a classroom assignment after he was properly found to have engaged in misconduct. This conclusion is made all the more evident by Dooley's employment contract, which specifically provided that the school board could assign him to a non-classroom assignment. We further note that none of the other issues raised by appellant have any merit, and the judgment of the district court is accordingly

AFFIRMED.

APPENDIX E

FIFTH CIRCUIT STATEMENT ON PETITIONS FOR REHEARING OR REHEARING EN BANC

NECESSITY FOR FILING

It is not necessary to file a petition for rehearing in the Court of Appeals as a prerequisite to the filing of a petition for certiorari in the Supreme Court of the United States.

PETITION FOR PANEL REHEARING

A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is *not* to be used for reargument of the issue previously presented or to attack the court's well settled summary calendar procedures. Petitions for rehearing are reviewed by panel members only. Four copies of all petitions for rehearing shall be filed.

EXTRAORDINARY NATURE OF SUGGESTIONS FOR REHEARING EN BANC

A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the misapplication of correct precedent to the facts of the case, are matters for *panel rehearing* but not for rehearing en banc.

THE MOST ABUSED PREROGATIVE

Suggestions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit. While such suggestions were filed in 13% of the cases decided by this circuit last year, less than 1% of the cases decided by the court are reheard en banc; and most of the rehearings granted resulted from a request for en banc consideration by a judge of the court initiated independent of any suggestion.

PETITION FOR REHEARING EN BANC

The form, contents and number of copies of the suggestion are set out in Local Rule 35 copied on reverse side.

TIME FOR COURT TO ACT ON PETITIONS

Panel members have ten (10) days from the filing of the petition for rehearing or suggestion for rehearing en banc, if one is filed, to communicate to each other any concerns about the correctness of any fact or principle of law, or to request a poll of the en banc court where a suggestion for en banc rehearing is filed. Otherwise, the order will be entered denying the petition. This corrects the I.O.P. to Local Rule 35 "Requesting a Poll".

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4-85-84-E
(Consolidated with 4-85-725-E)

HENRY S. DOOLEY

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT

(Filed December 9, 1987)

MEMORANDUM OPINION

Plaintiff, Henry S. Dooley, brought this action against Defendants, Fort Worth Independent School District and H. Richard O'Neal, Individually and as President of the Fort Worth School Board[1] pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*, Title 42, United States Code, Section 1983 and Fourteenth Amendment of the United States Constitution.

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1. At the close of Plaintiff's case, Defendant moved for a directed verdict with respect to both defendants. Since Plaintiff had presented no evidence against Dr. H. Richard O'Neal, the Court granted Defendant's motion for directed verdict with respect to Dr. O'Neal and carried along Defendant's motion for directed verdict with respect to the Fort Worth Independent School District.

Specifically, Plaintiff, a black male, alleges employment discrimination on the basis of race. This action was tried before the Court on April 13-16, 1987, the Honorable Eldon B. Mahon presiding.[2]

This Memorandum Opinion shall constitute the Court's findings of fact and conclusions of law in support of the judgment hereinafter ordered.

Plaintiff, Henry S. Dooley, resides in Tarrant County, Texas. Defendant, Fort Worth Independent School District, is an independent school district, duly organized under the laws of the State of Texas with its principle administration offices in Fort Worth, Tarrant County, Texas.

Plaintiff began working for Defendant School District in August 1967. He was employed under a series of one year term contracts each year until August 24, 1970. Plaintiff entered into a "continuing" contract of employment with Defendant School District on August 24, 1970, and remained employed under that continuing contract until his termination at the end of the 1984-85 school term.

During the 1983-84 school year, Plaintiff was assigned to teach sixth grade physical education. As an additional duty, Plaintiff coached boys' athletics at Meachum Middle School. On October 7, 1983, Plaintiff, while coaching a

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2. On March 30, 1987, the Court issued an Order denying Plaintiff's motion for a jury trial because Plaintiff's request for a jury approximately one month before trial was untimely, the majority of Plaintiff's complaint involved Title VII claims over which there is no right to a jury trial, and severance of Plaintiff's claims which could arguably be heard by a jury would not have been in the best interest of the parties since the facts of all Plaintiff's claims are the same.

football practice session, tackled an eighth grade student by the name of Jackie Hardy. On October 10, 1983, Ronnie White, Athletic Director FWISD, and the school principal, Johnny Bradford investigated the October 7, 1983 incident. White invited parents, the Vice Principal, and all students involved in the incident of October 7 to participate. Present during the questioning of each and every witness was Plaintff, and his representative, Ms. Karen Gambrell. Upon concluding his investigation, White suspended the Plaintiff from coaching until a final determination was made. On October 11, 1983, White's written recommendation was sent to Dr. T. C. Wallace, Director of Personnel, setting out White's findings that Plaintiff had tackled an eighth grade student.

On October 20, 1983, Defendant's Superintendent of Schools, Dr. I. Carl Candoli, notified Plaintiff of the District's proposed action to relieve him of all coaching duties. The notice further set forth the grounds for proposed reassignment from coaching. The Plaintiff was also notified of his right to contest the proposed action in a hearing. On October 25, 1983, Plaintiff notified the Superintendent of his desire for a hearing to contest his proposed release from the coaching assignment and on November 3, 1983, Defendant School District notified Plaintiff that his requested hearing would begin at 9:00 a.m. on November 15, 1983.

On November 15, 1983, a hearing was held as requested by Plaintiff. The hearing panel included Joe Ross, Assistant Superintendent for Community Employee and Governmental Relations, as Chair Person (white male), Ms. JoAnn Wright, Program Director for Student Affairs (white female), and Mr. Gus Whitted, Director of Affirmative Action (black male). Plaintiff was represented

by counsel at the hearing and given the opportunity to cross examine school district witnesses and to present witnesses of his own. On November 16, 1983, the hearing panel voted unanimously to relieve Plaintiff of his coaching assignment.

On November 23, 1983, Plaintiff was notified of the administrative panel's decision and of his right to appeal the decision to the board of education. Plaintiff was notified that his appeal would be based upon the record prepared before the administrative panel. On November 28, 1983, Plaintiff notified the Superintendent of his desire to appeal the administrative panel's decision to the school board. On December 8, 1983, Defendant O'Neal notified Plaintiff that his hearing before the Board would be on January 24, 1984.

On January 24, 1984, a hearing was held before the Board of Education based upon the record before the administrators, however, there was no official vote by the Board. Therefore, Plaintiff was notified on February 22, 1984, that the board would rehear his appeal on February 28, 1984. On February 28, 1984, based upon the record, the transcript and exhibits collected at the hearing before the administrative panel and the arguments of counsel for both parties, the Board voted in open meeting to terminate Plaintiff's coaching assignment effective February 29, 1984. The Board found that Plaintiff had used excessive and unreasonable force upon an eighth grade student by tackling said student on October 7, 1983. The Board further found that the physical force used was so excessive and unreasonable that it violated the policies of the Defendant School District. The Board directed the Superintendent to remove Plaintiff from all coaching assignments, to terminate his separate coaching

stipend effective February 29, 1984, and that Plaintiff be transferred from Meacham Middle School.

On February 29, 1984, written findings of the Board were sent to Plaintiff. Plaintiff was further notified that he had the right to appeal the decision of the Board of Education to the Commissioner of Education in the Texas Education Agency. Plaintiff appealed the action of the Board to the Commissioner of Education of Texas. On June 1, 1984, a hearing was held before a hearing officer appointed by the State Commissioner of Education. On January 10, 1985, Commissioner of education ordered that Plaintiff's appeal be in all things denied. On February 5, 1985, Plaintiff filed Civil Action No. 4-85-84-E against Defendant, Fort Worth Independent School District. On March 14, 1985, Plaintiff filed an original petition in the 167th Judicial District Court of Travis County, Texas, against the Fort Worth Independent School District and Texas Education Agency appealing the Commissioner's decision.

On or about March 8, 1984, Plaintiff, pursuant to the Board's order of February 28, 1984, was temporarily assigned to the Transportation Department pending an opening in a teaching field which Plaintiff was qualified. Said assignment continued to the end of the 1983-84 school term. Plaintiff was paid in full as a teacher. Plaintiff's contract with Defendant reads as follows:

> It is understood and agreed by the Parties to this agreement that the Superintendent of Schools shall have the right to assign such duties to the teacher as the Board shall deem proper, and may from time to time, assign the teacher to duties other than or additional to those contemplated hereunder.

Plaintiff's contract provides that he may be assigned to positions other than teaching. Plaintiff was temporarily reassigned by the Superintendent of Schools to Defendant Transportation Department because there were no teaching vacancies available within Defendant district at the time the Board ordered Plaintiff's removal from Meacham Middle School. Plaintiff was merely temporarily transferred to the Transportation Department pending an opening in the teaching field in which Plaintiff was qualified to teach or until the end of the 1983-84 school year. Plaintiff was notified of his new temporary assignment to the Transportation Department. Further, Plaintiff was provided the opportunity to contest or grieve his temporary assignment with the Superintendent of Schools. Plaintiff failed to request any further hearing or appeals after he and his representative discussed his reassignment with the Superintendent of Schools. Plaintiff suffered no loss of benefits while working in the Defendant's Transportation Department.

On or about March 21, 1984, Plaintiff filed a complaint with the Equal Employment Opportunity Commission alleging discriminatory acts by the Defendant School District. In response to Plaintiff's complaint, the E.E.O.C. issued a determination notice which found that "there is not reasonable cause to believe that the charge is true." Plaintiff presented his complaints regarding his temporary reassignment to the Transportation Department to the Commissioner of Education. The Commissioner found (see Defendant's Exhibit 34) the following:

> 23. The contract between the parties provides for reassignment of the teacher.
>
> 24. Petitioner was transferred, pursuant to the Board's order made on March 8, 1984, to

Respondent's Transportation Department. He had no teaching assignment and no student related responsibilities.

25. Petitioner was transferred to the Transportation Department because there were no teaching vacancies available within the district when the transfer was ordered.

26. Petitioner's transfer was temporary and was effective only until the end of the 1983-84 school year.

On August 27, 1984, Plaintiff was assigned a classroom teaching position teaching sixth grade science at Handley Middle School for the 1984-85 school year. On August 28, 1984, Plaintiff notified Dr. T. C. Wallace, Assistant Superintendent of Personnel, Fort Worth ISD, that he was not a science teacher and that he was being placed in an area where he had little knowledge or expertise. Based upon the Plaintiff's education and background, he was eligible to teach science. In early November 1984, Defendant FWISD provided assistance to Plaintiff through the principal of Handley Middle School, Science resource teachers, including Dr. Ruth Amon, and through the Director of Secondary Science for the school district, Dr. Sarah Jones. On January 5, 1985, Plaintiff requested a team evaluation. This request was granted.

Defendant School District has several programs to aid teachers. Among them are the Teacher's Assistance Program and a Team Evaluation Program. The Team Evaluation Program equals or exceeds the assistance given to Plaintiff under the Teacher's Assistance Program. Ample assistance was given to Petitioner to help him improve his performance; however, Plaintiff did not signifi-

cantly improve as a result of the assistance given. The Defendant School District received numerous complaints from parents concerning Plaintiff's teaching performance. Plaintiff had taught Science courses on numreous occasions in his teaching career. He taught Science during the 1981-82 school years.

Plaintiff is certified by the State Board of Education and has a professional elementary and professional high school certification. Pursuant to Texas education guidelines, Plaintiff's certification, in conjunction with the successful completion of a required number of college level science courses, qualified the Plaintiff to teach elementary or high school science. Plaintiff's teaching performance was deficient in the following areas:

a. Failure to obtain the essential elements to be taught and failure to teach the essential elements.

b. Failure to form long and short range plans.

c. Demonstrated little or no motivation of students and poor communication.

d. Delays in returning graded assignments to students.

e. Unwillingness to acknowledge teaching deficiencies with no concern for improvement.

f. A poor attitude about job assignment and disrespect to supervisors.

g. Non-existent or poorly done lesson plans.

h. Uncooperative in dealing with parents of students and staff.

i. Poor teaching techniques and poor use of teaching aids, and poor use of exams to measure teaching effectiveness.

On January 24, 1985, the team of evaluators, including Dr. Sarah Jones, Mr. Richard Wilson Director of Middle Schools, and Don Ponder, Principal, conducted their formative evaluation of Plaintiff. Dr. Sarah Jones, a black female, is the Program Director of Science for the Defendant School District. She holds a doctorate degree in Chemistry and has been employed by the School District for 36 years. After the evaluation, the three (3) evaluators met with Plaintiff to discuss their finding. On February 28, 1985, the evaluators presented their evaluation to Plaintiff. The final recommendation of the team of evaluators was: "At the present time we do not recommend continued employment." On March 27, 1985, Plaintiff was notified of the Board's proposed intent to terminate his employment with the district effective at the end of the 1984-85 school year. The notice set out ten grounds for proposed termination and informed Plaintiff of the specific school district policies which were violated. It stated such violations constituted lawful discharge under Sections 13.109 and 13.110 of the Texas Education Code. Plaintiff was further notified that he may contest the proposed action by requesting a hearing. On April 5, 1985, Plaintiff notified the Board of his desire to contest the termination and informed the Board the name of his counsel who would represent him at the hearing. On April 16, 1985, Plaintiff's counsel, Elena Cablao was informed that the Board planned to hear Mr. Dooley's contest to the proposed termination of his contract of employment on Tuesday, April 30, 1985. On April 30, 1985, all parties were informed by the Board that the hearing would take place on May 2, 1985, due to conflict of hearings on April 30, 1985.

On May 2, 1985, Plaintiff and his counsel, together with the administration and their representative, presented

witnesses and documents for the school board's consideration. Later, after hearing the evidence and testimony presented by both sides, the Board voted five (5) in favor, one (1) against to terminate Plaintiff's contract with the district effective the last day of school for the 1984-85 school year. Plaintiff was present when that decision was announced. On May 8, 1985, written notification of the Board's decision to terminate Plaintiff's contract was delivered to him, notifying him of his right to appeal to the Commissioner of Education. Plaintiff appealed to the Commissioner of Education. On January 9, 1986, a hearing was held before a Hearing Officer appointed by the State Education Commissioner. On January 19, 1987, the Commissioner of Education denied Plaintiff's appeal in all things. On October 25, 1985, Plaintiff filed Civil Action 4-85-725-E against Defendant, Fort Worth Independent School District, and H. Richard O'Neal, Individually and as President of the Fort Worth School Board.

Lastly, Plaintiff has not passed the Texas Examination of Current Administrators and Teachers (TECAT). Therefore, he does not presently possess a valid current teacher or administrators certificate.

I. *Claims Arising Under the United States Constitution*

A. The Property Claim

Dooley contends that his temporary reassignment to the Transportation Department constituted a deprivation of property without due process of law. Essential to the success of Dooley's federal constitutional claim is the establishment of a property interest in his teaching duties. Dooley's Amended Proposed Findings of Fact and Conclusions of Law states that "Plaintiff, as a coach, was

hired as a teacher and may not be assigned to other *non-teaching* duties. . . ." Dooley cites *Grounds v. Tolar Independent School District*, 694 S.W.2d 241 (Tex. App.—Fort Worth 1985), *rev'd on other grounds*, 707 S.W.2d 889 (Tex. 1986), and *Jett v. Dallas Independent School District*, 798 F.2d 754 (5th Cir. 1986), for the proposition that such a reassignment deprived him of an acquired property interest in his coaching and teaching responsibilities.

The citation of *Grounds* and *Jett* cases for this proposition—if not purposefully calculated to mislead—is at best tenuous. Dooley is quite correct in asserting that his constitutional claim depends upon the existence of a property right. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985). But the *Grounds* and *Jett* decisions do not establish a property interest in a school teacher's assigned duties absent a specific contractual provision to that effect. In *Jett*, the Fifth Circuit Court of Appeals held that neither

> Jett's written contract nor his oral contract with the [school district] gave Jett a property interest in his coaching duties. Therefore, although he may have had a property interest in his *coaching salary* for the 1982-1983 school year, he did not have such an interest in the continuation of his coaching responsibilities throughout that year.

Jett, 798 F.2d at 754 (emphasis added). Similarly in *Grounds*, the Fort Worth Court of Appeals held that "coaches are hired as teachers and may be assigned to other teaching duties at the discretion of the school district unless the coach's contract specifically limits the duties to which he may be assigned." *Grounds*, 694 S.W.2d at 245.

Dooley's contract, in the case at bar, contains no provision limiting the school district's right to modify a teacher's duties. To the contrary, Dooley's contract specifically provides that "the Superintendent of Schools shall have the right to assign such duties to the Teacher as the Board shall deem proper, and may, from time to time, assign *or reassign the Teacher to duties other than* or additional to those contemplated" by the agreement. (Emphasis added).

On its face, Dooley's employment contract states that Dooley could be assigned to duties other than teaching or coaching. Accordingly, the Court finds that Dooley has failed to establish a loss of property interest in regard to his temporary reassignment to the Transportation Department. Dooley's only property interest arising under his employment contract was his salary for the contractual year. In 1984, the year in which Dooley was temporarily reassigned pending an available teaching position, he received full payment as a teacher while working in the Transportation Department. Thus, Dooley was not deprived, without due process of law, of the only property interest arising under his contract.

B. The Liberty Interest

Even if Dooley was entitled to due process in connection with his reassignment from coaching, the record in this cause firmly establishes that he was accorded due process in accordance with the Fourteenth Amendment. Dooley—when he was relieved of his coaching responsibilities, when he was temporarily reassigned to the Transportation Department, and when he was ultimately positioned as a secondary science teacher—was afforded the advantage of every procedural safeguard. Dooley was

given notice of the Superintendent's intent to relieve him of his coaching responsibilities and was permitted to request an administrative hearing regarding the Superintendent's proposed action. The evidence in this case indicates the hearing was eminently fair and impartial. Dooley proceeded to fully exhaust his right to appeal. He contested the administrative panel's decision to relieve him of his coaching responsibilities by appealing to the Board of Education, then to the Commissioner of Education, and finally to the 167th Judicial District Court of Travis County, Texas.

Dooley was likewise invited to contest his temporary assignment to the Transportation Department. He did not accept the invitation. When a suitable teaching position became available, the School District assigned Dooley to a teaching position and assisted him in improving his secondary science teaching skills. At Dooley's request, the School District provided him with a team evaluation of his teaching capabilities. When the evaluation team found Dooley's performance severely lacking in several respects, Dooley was given notice of the evaluators' recommendation that his employment be discontinued at the end of the 1984-85 school year. Again, Dooley was given notice of his right to request a hearing before the School Board to contest this recommendation. Dooley requested a hearing, and the evidence presented at trial indicates that he received a full and fair opportunity to be heard before the School Board. Dooley appealed the School Board's decision to terminate his employment, and their decision was upheld on appeal by the State Education Commissioner.

The record before the Court is devoid of a procedural infraction in regard to Dooley's: (1) removal from coach-

ing responsibilities, (2) temporary transfer to the Transportation Department, (3) reassignment to teaching secondary science, and (4) ultimate termination. Dooley was allowed every procedural safeguard that any other teacher similarly situated would have received. Thus, even assuming *arguendo* that Dooley had a property interest in the matters listed above, there is no evidence contained in this record that Dooley's rights under the Due Process Clause of the Fourteenth Amendment were violated in any respect.

C. Section 1983 Claims

Section 1983 of title 42 of the United States Code does not create or secure any substantive rights in itself, but merely authorizes a cause of action when rights secured by another source have been infringed. *Garcia v. Wilson,* 731 F.2d 640, 650 (10th Cir. 1984), *aff'd,* 105 S. Ct. 1938 (1985). Since this Court finds no evidence to support Dooley's allegations that his rights under the Due Process Clause have been violated, it cannot sustain Dooley's claims under section 1983 as a matter of law. Absent a violation of constitutional rights, section 1983 provides no independent basis for recovery or injunctive relief.

II. *Dooley's Claims Arising Under Title VII of the Civil Rights Act of 1964*

A. Disparate Treatment

Dooley alleges that his removal from his coaching responsibilities by the Defendant School District was a discriminatory disciplinary action, imposed upon Dooley solely because of his race, and was thus unlawful pursuant to section 2000e-2 of title 42 of the United States Code.

Dooley contends that white teachers similarly situated would have been treated differently.

The United States Supreme Court in the *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), set forth the requirements of the plaintiff's prima facie case in a "disparate treatment" suit. The Court stated:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that [he] was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. As the Court explained in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), the prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors'

Id. at 253-54 (citations omitted).

Even assuming *arguendo* that Dooley has made out a prima facie case of disparate treatment, admittedly not an "onerous" burden, the School District has successfully met its burden of articulating a legitimate, nondiscriminatory reason for Dooley's transfer to the Transportation Department. *Id.* at 253. Dooley was reassigned due to his misconduct in tackling an eighth grade student football player that failed to perform as desired by Dooley. Likewise, Dooley has failed to meet his burden of proving by a preponderance of the evidence that the reasons offered by the School District for his reassignment were false, or a mere pretext for discrimination.

B. Retaliatory Conduct

Dooley further alleges that his assignment to teach secondary science was racially motivated and was in retaliation for Dooley's filing of charges of race discrimination. Such allegations, if true, constitute a violation of section 2000e-3 of title 42 of the United States Code. In order to make a prima facie case of retaliation, Dooley must prove: (1) that he was engaged in an activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that there was a causal link between participation in the protected activity and the adverse employment decision. *McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116 (5th Cir. 1983).

Dooley did engage in a protected activity when he filed this lawsuit after the Commissioner of Education denied Dooley's appeal of the School Board's decision to remove him from his coaching responsibilities. There is not a scintilla of evidence, however, which indicates that filing of Dooley's action had any bearing on the decision of the School District to assign Dooley to the position of teaching sixth grade science. Dooley was a properly certified elementary and high school teacher, who had taught science on numerous other occasions. Dooley had been properly relieved of his coaching responsibilities and temporarily assigned to the Transportation Department. The School District reassigned Dooley to teaching duties at the first available opportunity: namely, the beginning of the 1984-85 term.

While Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 provide separate and independent remedies for racial discrimination in employment, both laws require an intentional discriminatory act as a predicate

to liability. *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1315 (5th Cir. 1980). Since this Court finds that the record is devoid of any probative evidence of discriminatory intent on the part of the School District when reassigning Dooley to teach secondary science, Dooley's section 1981 claim cannot be sustained.

III. *Conclusion*

In sum, Dooley has failed to prove, by a preponderance of the evidence, that his rights under the Due Process Clause of the United States Constitution were violated. Dooley has also failed to make out a prima facie case for race discrimination, desparate treatment, or retaliatory action under Title VII of the Civil Rights Act of 1964. Such failure likewise precludes recovery on Dooley's section 1983 and 1981 claims. Accordingly, Dooley's request for relief under the Constitution, Title VII, and sections 1983 and 1981 is DENIED.

A judgment will be entered consistent with this opinion.

Signed this 9th day of December, 1987.

By: /s/ ELDON B. MAHON
Eldon B. Mahon
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-85-84-E
(Consolidated with 4-85-725-E)

HENRY S. DOOLEY,
Plaintiff,

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT, ET AL.,
Defendants.

(Filed March 5, 1987)

PLAINTIFF'S FIRST AMENDED
ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

I.

Jurisdiction is conferred upon this Court by 42 U.S.C. § 2000(e)(5)(f) and by 28 U.S.C. § 1331, § 1343, 42 U.S.C. § 1981, § 1983, the 14th Amendment of the United States Constitution and the pendent state claim under the Texas Education Code, Chapter 13, et seq.

Jurisdiction is also conferred pursuant to 42 U.S.C. § 2000e - § 20003-17 as hereinafter more fully appears.

II.

(a) Plaintiff, HENRY S. DOOLEY, is a Black Citizen of the United States and a resident of Fort Worth, Tarrant County, Texas. Plaintiff is a veteran teacher and former coach in the Fort Worth Independent School District.

(b) The Defendant, Fort Worth Independent School District (hereinafter FWISD) is a school district chartered and organized under the laws of the State of Texas for the public education of the citizens of Fort Worth, Texas. Said Defendant is located and conducts its activities within the Northern District of Texas, and is an employer within the meaning of 42 U.S.C. § 2000(e)(b). The said Defendant is further engaged in an industry affecting commerce and employs more than fifteen (15) persons.

The school district is authorized to employ and contract the necessary and qualified teachers and discharge same for cause, pursuant to Texas law.

Defendant, H. Richard O'Neal is President of the Board of Trustees for Defendant FWISD and along with other Board Members, has the responsibility of the general charge of the business of the district and shall employ and contract with the necessary qualified teachers and discharge the same for cause, pursuant to law. Said Defendant is sued individually as well as in his official capacity. At all times complained of herein, Defendants, their agents and employees, were acting under color of State law.

III.

NATURE OF CASE

1. This proceeding seeks injunctive, monetary, and declaratory relief against the practices, customs, policies

and conduct of the Defendants, acting under color of State law, in terminating Plaintiff's employment as a public school teacher and coach. in retaliating against Plaintiff for his participation in the filing of charges of discrimination against Defendants and opposition to unlawful and discriminatory practices in the FWISD.

2. Plaintiff graduated in 1955 with a Bachelor of Science Degree from Wiley College and a Master of Science Degree from Prairie View A&M University in 1969. His record in public education and coaching covers some twenty-eight (28) years within the State of Texas. As a coach in the Fort Worth Independent School District, Plaintiff has coached football, track, soccer and basketball on either the middle and high school levels.

3. Plaintiff began working for Defendant in 1967 as a duly licensed and certified teacher/coach and worked there continuously in such capacity until he was fired from coaching duties on or about October 7, 1983. Prior to the filing of this cause and the matters at issue herein, Plaintiff was a continuing contract teacher pursuant to the Texas Education Code. Plaintiff would further show that he filed a charge of discrimination against Defendant FWISD in 1979 and a second charge of discrimination was filed against this Defendant in 1981. In his charges of discrimination, Plaintiff complained of Defendant's failure to promote and advance Blacks within Defendant's athletic department.

4. Plaintiff was suspended from all coaching duties with the Defendant School District on or about October 10, 1983 upon the recommendation of the Defendant District's Athletic Director, Ronnie White. Mr. White's actions were precipitated by Plaintiff's efforts to perform a "wrap-up" tackle on a student football player during

instructional drills on October 7, 1983 at the Meacham Middle School. The student athlete, Jacky Hardy, alleged that he was tackled and taken to the ground by Plaintiff. Plaintiff contends that he was not trying to tackle the student in question but, in an effort to perform a commonly used "wrap-up tackle" he lost his footing and slipped, carrying himself and Mr. Hardy to the ground. Mr. Hardy sustained no injury of consequence. Plaintiff has contended throughout the course of his appeal that a "wrap-up tackle" is a drill commonly used among football players designed to stop a player's movement and in such a fashion that the player is actually picked up, yet not taken to the ground. Mr. Hardy, subsequent to the aborted "wrap-up tackle," picked himself up off the ground, retrieved a stone to throw at Plaintiff . . . screamed a racial slur at Plaintiff and then proceeded to leave the football field.

5. By letter dated October 20, 1983, Plaintiff was advised by Superintendent I. CARL CANDOLI that he would recommend to the Defendant District's Board of Education that Plaintiff be relieved of any and all coaching duties within the district as a result of Plaintiff's alleged "excessive physical force upon the student athlete" and "unreasonable force used to discipline and/or enforce compliance with instructional requests." In the Candoli letter of October 20, 1983, the Superintendent cited Plaintiff as violating *unspecified* provisions of the Texas Education Code; Section 9.62 of the Texas Penal Code; Section 5.6(d)(1) and 5.6(f) of the Fort Worth Independent School District Administrative Policies; along with *unspecified* provisions of the Fort Worth Athletic Handbook, Code of Ethics, and the University Interscholastic League Handbook. At no time during the course of this incident has the Defendant given Plaintiff specific

notice of the particular provisions of the Fort Worth Athletic Handbook, the Code of Ethics, the University Interscholastic League Handbook or the Texas Education Code, Plaintiff allegedly violated by his alleged conduct.

6. Subsequent to the recommendation of the Superintendent to the Defendant School District relative to Plaintiff's termination from coaching, Plaintiff requested an appeal from the Board's acceptance of said recommendation. On or about November 15, 1983, Plaintiff's appeal was heard before a select committee of District administrators. At the appeal hearing, the Defendant School District again failed to specifically notice Plaintiff as to the particular provisions of the Fort Worth Athletic Handbook, the Code of Ethics, the University Interscholastic League Handbook and the Texas Education Code allegedly violated as required under all traditional notions of due process.

7. By letter dated November 23, 1983, Plaintiff was advised that the administrative panel which convened on November 15, 1983 to hear his appeal had unanimously upheld the Superintendent's recommendation that he be relieved from all coaching duties with the District. This panel further recommended that Plaintiff be administratively transferred to another school. This letter further advised Plaintiff of his right to appeal this decision to the full Board based on the record. Mr. Dooley timely appealed the decision of the administrative panel and was given a hearing before the Board on January 24, 1984.

8. At the appeal hearing of January 24, 1984 before the Board, the Defendant District again failed to specifically notice Plaintiff as to the particular provisions of the Fort Worth Athletic Handbook, the Code of Ethics,

the University Interscholastic League Handbook, and the Texas Education Code allegedly violated.

9. At the hearing before the Board of January 24, 1984 only five of the nine board members were present to wit: Defendant Dr. H. Richard O'Neal, Mollie Lasater, T. A. Sims, Maudrie Walton, and Joycelyn Wuester. By letter dated January 27, 1984, the Board's President, Defendant Dr. H. Richard O'Neal, advised Plaintiff that his appeal before the Board had been denied and that Plaintiff would be relieved of all coaching duties and reassigned to another school.

10. The Defendant District's Board attempted to rehear Mr. Dooley's appeal, notwithstanding that a previous hearing had been conducted on or about January 24, 1984. Plaintiff did not appear at this hearing on February 28, 1984; however, Plaintiff's counsel appeared before the District's Board and advised that Plaintiff, himself, would not appear in that the Board no longer maintained jurisdiction of the issues in the matter, in view of a pending appeal to the Texas Education Agency.

11. At the purported hearing of February 28, 1984 the Defendant District's Board for the very first time attempted, by resolution to suspend Plaintiff's purported discharge of January 24, 1984. Thereafter, the Board heard oral argument from the District's counsel and thereupon proceeded to resolve that Plaintiff again be removed from his teaching and coaching responsibilities at the Meacham Middle School effective February 28, 1984. By letter from the Defendant Board President dated February 29, 1984, Plaintiff was officially advised of the Board's decision terminating his teaching and coaching responsibilities as a result of this second, illegally held hearing. In its decision, the Defendant District's

Board also advised Plaintiff that he would be reassigned from the Meacham Middle School. This action resulted in the Defendant District's Superintendent unilaterally taking Plaintiff away from his professional contractual teaching duties and placing him in the transportation department, manually loading and transferring school bus parts.

12. During the school year 1984-1985, Plaintiff was certified by the State of Texas with a certification in Health in Physical Education. Notwithstanding this certification, Defendant FWISD assigned Plaintiff to teach 6th grade Science at its Handley Middle School during the school year 1984-1985.

13. During the 1984-1985 school year, and as a result of not having the appropriate training nor certification, Plaintiff encountered various problems in teaching 6th grade Science. As a result of these difficulties, Plaintiff requested of Defendants, appropriate guidance and assistance to better enable him to accomplish his teaching assignment. More specifically, Defendants maintained a Teacher Assistance Program, specifically designed to aid a teacher such as Plaintiff, in his professional development. Notwithstanding the existence of this program, and the Plaintiff's request for participation in same, Defendants denied Plaintiff participation in said Teacher Assistance Program.

14. Plaintiff would further show that after being compelled by Defendants to remain at its Handley Middle School to teach 6th grade Science he continued to express to Defendant's administrative officials his concerns relating to his assignment for which he was not certified to teach. As a result of Plaintiff's assignment by Defendants to Handley Middle School, Plaintiff was compelled to

work under conditions wherein he was denied use of a classroom for teaching purposes, and was compelled by Defendants to push a mobile cart from area to area, for purposes of transporting the various equipment need to teach his assigned courses. Upon information and belief, Plaintiff alleges that he was the only teacher within Defendant FWISD's system so assigned.

15. On or about April 3, 1985, Defendants acknowledged their error in improperly assigning Plaintiff to its Handley Middle School teaching 6th grade Science. On or about April 3, 1985, Defendant FWISD removed Plaintiff from its Handley Middle School and reassigned Plaintiff to teach Physical Education at two separate middle schools. As a result of this reassignment, Plaintiff was directed by Defendants to teach at Stripling Middle School between 9:00 a.m. and 11:45 a.m., thereafter, Plaintiff was required to travel by personal automobile to the Leonard Middle School, having to report at 12:42 p.m. and permitted release therefrom at 4:00 p.m. each day. Upon information and belief, Plaintiff alleges that no other teacher within Defendant FWISD has been so assigned.

16. The Plantiff would further show that upon being reassigned by Defendants on April 3, 1985, he was given approximately fifty-one (51) minutes to prepare himself at the conclusion of his last morning class, eat lunch, and travel to Leonard Middle School for his afternoon teaching assignment. Upon information and belief no other teacher within Defendant FWISD has been so assigned.

17. On or about May 2, 1985, Defendant FWISD's Board of Education convened to act upon Superintendent I. C. Candoli's recommendation that Plaintiff's contract

of employment be terminated effective at the end of 1984-1985 school year. Plaintiff appeared before Defendant's Board of Education, with counsel, to contest the Superintendent's recommendation that his employment contract be terminated. The hearing before the Defendant FWISD's Board of Trustees was presided over by Defendant O'Neal. Plaintiff would further show that at the May 2, 1985 hearing, regarding his termination, Defendant's Board of Trustees, which took the adverse action against Plaintiff, was not duly constituted consistent with the requirements of Texas Education Code § 13.114, and therefore constituted an abridgement of Plaintiff's rights under the Due Process Clause of the 14th Amendment of the United States Constitution.

18. The Plaintiff would further show that prior to the hearing of May 2, 1985 concerning the Plaintiff's termination, Defendants failed to properly advise and inform Plaintiff, in detail, of the cause or causes of his proposed termination, the names of witnesses or nature of testimony against him so as to afford him a meaningful opportunity to present his defense. Plaintiff would further show that in view of the makeup of Defendant's Board of Education, coupled with pending litigation Plaintiff has filed against Defendants, he was denied a hearing before a tribunal that was an impartial decision maker in contravention of the Due Process Clause of the 14th Amendment of the United States Constitution.

IV.

FIRST CAUSE OF ACTION

19. Plantiff hereby incorporates the allegations of paragraphs 1 through 18 in support of this cause of action.

20. Plaintiff, as an employee of the Fort Worth Independent School District was and is entitled to certain substantive and procedural due process rights which must be afforded to him in order to protect his property interest in continued employment with the FWISD. Plaintiff has a legal claim of entitlement by contract, policy, rules and regulations to continued employment with the FWISD. In spite of these procedural and substantive due process guarantees, Plaintiff was not afforded the following due process guarantees:

a. The appointment of an impartial decision maker to hear his administrative appeal of his termination from coaching and teaching duties in October 1983, and his non-renewal as a teacher with the Fort Worth Independent School District in May, 1985.

b. Specific notice of the charges against him and the specific rules, regulations, and/or procedures Plaintiff allegedly violated which served as a basis for Plaintiff's termination from coaching and teaching duties in October, 1983.

c. A full procedural due process hearing including, but not limited to, specific notice, an opportunity to be heard in order to present a defense, and an impartial decision maker, when Plaintiff was terminated as a teacher and hired as a worker in the transportation department in March, 1984. Plaintiff was afforded no due process hearing in order for Plaintiff to complain of his termination teaching duties.

d. A vote of a majority of the full membership of the FWISD Board of Trustees in order to terminate Plaintiff's employment contract as a coach and a

teacher at a hearing on January 24, 1984. This denial of his due process rights was also in violation of state law as outlined in the Texas Education Code, Chapter 13.

The denial of such due process and procedural guarantees are in clear violation of the Due Process Clause of the 14th Amendment to the United States Constitution for which Plaintiff now complains and seeks damages.

V.

SECOND CAUSE OF ACTION

21. Plaintiff alleges that the acts complained of in the foregoing First Cause of Action incorporated by reference herein form the basis of the unconstitutional acts of the Defendants complained of in his Second Cause of Action.

22. Plaintiff has been discriminated against because of his race, Black, in that he has been disciplined in an unfair, unlawful and discriminatory manner. Similarly situated white teachers have not been terminated from their coaching responsibilities without use of the progressive discipline procedure in effect in the Defendant School District at the time of Plaintiff's proposed termination in October, 1983. Nor have similarly situated white teachers been stripped of their teaching duties during the term of their contract and assigned to perform non-teaching, menial tasks in the transportation department or similar School District departments as was Plaintiff in March, 1984.

23. Defendant's actions in assigning Plaintiff to teach a class for which he was not certified to teach in the 1984-1985 school was racially motivated and discrimina-

tory against Plaintiff because of his race, Black. Defendant's actions were in retaliation for Plaintiff's participating in the filing charges of racial discrimination against Defendant and for Plaintiff's opposition to unlawful and discriminatory policies and practices of Defendant FWISD for which Plaintiff now complains and seeks damages.

24. Within one hundred eighty (180) days of the occurrence of the acts of which Plaintiff complains, charges of retaliation for opposing discriminatory practices were filed with the Equal Employment Opportunity Commission (EEOC) by Plaintiff herein on or about March 21, 1984 against the herein named Defendant.

25. On or about November 26, 1984 Plaintiff received a "Notice of Right to Sue" from the office of the EEOC entitling him to institute a civil action in the appropriate Federal District Court within ninety (90) days of the date of receipt of said notice. This suit is brought within the said ninety (90) day period.

VI.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court advance this case on the docket, order a speedy hearing and upon such hearing:

1. Enter a declaratory judgment declaring that the acts and practices of the Defendants complained of herein are in violation of the Constitution and the laws of the United States;

2. Issue a permanent injunction on behalf of the Plaintiff enjoining Defendants, their officers, agents, successors, employees and other representatives and

all those acting in concert with them and at their direction; from taking any actions against Plaintiff on the basis of his race; to make Plaintiff whole for all lost pay, benefits, and compensatory damages; and reinstating Plaintiff to his former position as a teacher and coach;

3. Enter a judgment in favor of Plaintiff against Defendant Fort Worth Independent School District and Defendant Richard O'Neal in his individual and official capacity, jointly and severally, awarding him Two Million Five Hundred Thousand Dollars ($2,500,000.00) in compensatory and general damages;

4. Pre-judgment interest;

5. Grant Plaintiff his attorney's fees, costs and disbursements; and

6. Grant such additional relief as Plaintiff shows himself justly entitled.

Respectfully submitted,

HILL HICKS COLLINS
Attorneys and Counselors at Law

By: /s/ DONALD W. HILL
Donald W. Hill
Bar Card No. 09628400
Renaissance Place - Suite 530
714 Jackson Street
Dallas, Texas 75202
Telephone No. (214) 744-0255

CERTIFICATE OF SERVICE (Omitted)

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4-85-84-E
(Consolidated with 4-85-725-E)

HENRY S. DOOLEY,
Plaintiff

v.

FORT WORTH INDEPENDENT SCHOOL DISTRICT; H. RICHARD O'NEAL, Individually and as President, Fort Worth School Board

APPLICATION FOR PRELIMINARY AND PERMANENT INJUNCTION AND ORIGINAL COMPLAINT

I.

JURISDICTION AND VENUE

This Court has jurisdiction of this cause pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1331 and 1343(3)(4); 38 U.S.C. § 2201 and 2202; 42 U.S.C. § 1981, as amended; and the 9th and 14th Amendments to the U.S. Constitution; and perdent jurisdiction under Tex. Ed. Code, Chapter 13, et seq.

Venue is proper within this Judicial District pursuant to 28 U.S.C.A. § 1391(b) that the claims herein arose in this judicial district.

II.

PARTIES

Plaintiff, Henry S. Dooley is a citizen of the United States and of the State of Texas, permanently residing in Fort Worth, Tarrant County, Texas. He is a duly licensed and certified teacher and has been most recently employed by the Fort Worth Independent School District as a middle school teacher-coach. Prior to the filing of this case, Plaintiff was a continuing contract teacher pursuant to Texas law.

Defendant, Fort Worth Independent School District (hereinafter FWISD) is a governmental entity organized and existing under the laws of the State of Texas for the public education of the citizens of Fort Worth, Texas. The school district is authorized to employ and contract the necessary and qualified teachers and discharge same for cause, pursuant to Texas law.

Defendant, H. Richard O'Neal is President of the Board of Trustees for Defendant FWISD and along with other Board Members, has the responsibility of the general charge of the business of the district and shall employ and contract with necessary qualified teachers and discharge the same for cause, pursuant to law. Defendant, O'Neal is, under Texas law, acting as an agent and administrative officer of the State of Texas. Said defendant is sued individually as well as in his official capacity. At all times complained of herein, defendants, their agents and employees, were acting under color of State law.

III.

STATEMENT OF CLAIMS

1. This proceeding seeks injunctive and declaratory relief against the practices, customs, policies and conduct of the defendants, acting under color of State law, in terminating plaintiff's employment as a public school teacher.

2. The plaintiff, Henry S. Dooley, prior to the filing of this suit, was employed as a teacher-coach with the defendant, Fort Worth Independent School District (hereinafter FWISD). During the school year 1984-85, plaintiff was certified by the State of Texas with a certification in Health and Physical Education. Notwithstanding this certification, defendant FWISD assigned plaintiff to teach 6th grade Science at its Handley Middle School, during the school year, 1984-85.

3. During the 1984-85 school year, and as a result of not having the appropriate training nor certification, plaintiff encountered various problems in teaching 6th grade Science. As a result of these difficulties, plaintiff requested of defendants, appropriate guidance and assistance to better enable him to accomplish his teaching assignment. More specifically, defendants maintained a Teacher Assistance Program, specifically designed to aid a teacher such as plaintiff, in his professional development. Notwithstanding the existence of this program, and plaintiff's request for participation in same, defendants denied plaintiff participation in said Teacher Assistance Program effectively abridging plaintiff's rights under the Equal Protection Clause of the 14th Amendment of the United States Constitution.

4. Plaintiff would further show that after being compelled by defendants to remain at its Handley Middle School to teach 6th grade Science he continued to express to defendants administrative officials, his concerns relating to his assignment for which he was not certified to teach. As a result of plaintiff's assignment by defendants to Handley Middle School, plaintiff was compelled to work under conditions wherein he was denied use of a classroom for teaching purposes, and was compelled by defendants to push a mobile cart from area to area, within and outside of the school's main facility, for purposes of transporting the various equipment needed to teach his assigned courses. Upon information and belief, plaintiff alleges that he was the only teacher within defendant FWISD's system so assigned, and such actions by defendants constituted an abridgement of plaintiff's rights under the Fourteenth Amendment of the United States Constitution.

5. On or about April 3, 1985, defendants acknowledged their error in improperly assigning plaintiff to its Handley Middle School teaching 6th grade Science. On or about April 3, 1985, defendant FWISD removed plaintiff from its Handley Middle School and reassigned plaintiff to teach Physical Education at two separate middle schools. As a result of this reassignment, plaintiff was direct by defendants to teach as Stripling Middle School between 9:00 a.m. and 11:45 a.m., thereafter, plaintiff was required to travel by personal automobile to the Leonard Middle School, having to report at 12:42 p.m. and permitted release therefrom at 4:00 p.m. each day. Upon information and belief, plaintiff alleges that no other teacher within defendant FWISD has been so assigned and further alleges that such reassignment denied

plaintiff Equal Protection under the law as required under the 14th Amendment of the United States Constitution.

6. The plaintiff would further show that upon being reassigned by defendants on April 3, 1985, he was given approximately fifty-one (51) minutes to prepare himself at the conclusion of his last morning class, eat lunch, and travel to the Leonard Middle School for his afternoon teaching assignment. Upon information and belief no other teacher within defendant FWISD has been so assigned and plaintiff further alleges that such conduct abridged his rights of Equal Protection under the law as provided under the 14th Amendment of the U. S. Constitution.

7. On or about May 2, 1985, defendant FWISD's Board of Education convened to act upon Superintendent I. C. Candoli's recommendation that plaintiff's contract of employment be terminated effective at the end of the 1984-85 school year. Plaintiff appeared before defendant's Board of Education, with counsel, to contest the Superintendent's recommendation that his employment contract be terminated.

The hearing before the defendant FWISD's Board of Trustees was presided over by defendant O'Neal. Plaintiff would further show that at the May 2, 1985 hearing, regarding his termination, defendant's Board of Trustees, which took the adverse action against your plaintiff was not duly constituted consistent with the requirements of Texas Education Code § 13.114, and therefore constituted an abridgement of plaintiff's rights under the Due Process Clause of the 14th Amendment of the U.S. Constitution.

8. Your plaintiff would further show that prior to the hearing of May 2, 1985 concerning the plaintiff's termination, defendants failed to properly advise and inform plaintiff, in detail, of the cause or causes of his proposed termination, the names of witnesses or nature of testimony against him so as to afford him a meaningful opportunity to present his defense. Plaintiff would further show that in view of the makeup of defendant's Board of Education, coupled with pending litigation plaintiff has filed against defendants, he was denied a hearing before a tribunal that both possessed academic expertise and had apparent impartiality toward those charges, if any, against plaintiff, in contravention of the Due Process Clause of the 14th Amendment of the U.S. Constitution.

9. Plaintiff would further show that the billigerent, hostile and rude atmosphere created by defendant O'Neal, relative to the manner in which he conducted the May 2, 1985 hearing, further constituted an abridgment of plaintiff's rights under the Due Process Clause of the 14th Amendment of the U.S. Constitution, guaranteeing him a fair and impartial hearing before an impartial tribunal; and an abridgement of plaintiff's rights under the Ninth Amendment to the U.S. Constitution.

IV.

Plaintiff has suffered and will continue so suffer irreparable injury by the policies, practices and conduct of defendants complained of herein until same are enjoined by this Court. Plaintiff has no plain, adequate or speedy remedy at law to redress the grievances herein set forth in this suit for injunctive relief.

WHEREFORE, Plaintiff prays that this Court advance this cause on the document, order a speedy hearing on this cause of action according to law, and after such hearing enter a preliminary and permanent injunction enjoining defendants and their agents, employees, successors, attorneys and all persons in active concert and participation with them from:

1. Barring or otherwise precluding Plaintiff from employment as a continuing contract teacher within the Fort Worth Independent School District;

Plaintiff further prays that this Court issue a mandatory injunction ordering defendant, Fort Worth Independent School District and defendant Dr. H. Richard O'Neal to reinstate plaintiff as a continuing contract teacher within the Fort Worth Independent School District with back pay from the beginning of the 1985-86 school year. Plaintiff further prays that this Court:

(1) Issue a temporary restraining order and/or a preliminary injunction ordering defendants, their officers, defendants Fort Worth Independent School District, and Dr. H. Richard O'Neal, their officers, agents, employees, successors and attorneys and all those in active concert or participation with them from participation of the conduct complained of herein;

(2) Issue a declaratory judgment that the practices customs, policies and conduct of defendants relative to the conduct complained of herein is unconstitutional and in violation of the 9th and 14th Amendments of the United States Constitution;

(3) Award Plaintiff $300,000.00 as actual damages, and mental and emotional distress caused by the conduct of your defendants;

(4) Award plaintiff his cost and dispersements herein, as well as reasonable attorney's fees;

(5) Award plaintiff such other and further relief as this Court may deem proper.

Respectfully submitted,

SALVANT & FLEMING
610 E. Weatherford Street
Fort Worth, Texas 76102
817/335-1043

By: /s/ DONALD J. FLEMING
Donald J. Fleming
State Bar No. 07122500
ATTORNEY FOR PLAINTIFF

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO._____

HENRY S. DOOLEY

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT

AFFIDAVIT

My name is HENRY S. DOOLEY and I am over the age of eighteen (18) years of age and I am also the Plaintiff in the above styled and numbered lawsuit. I have been previously employed by the Fort Worth Independent School District (hereinafter FWISD) during the period of 1967 through the 1985 school year. I was employed at the time of my unlawful discharge as a certified Health and Physical Education teacher assigned to teach Sixth grade Science. Even though I was certified in Health and Physical Education, I was forced by the FWISD to teach Science, of which I had no training, and for which I was not certified to teach.

I was denied participation in the Teacher Assistance Program which was available to aid teachers in any area where a given teacher required support in his professional development. This program was made available to other teachers who were similarly situated as myself. The FWISD refused to provide necessary professional guid-

ance for me, notwithstanding, I was being compelled to teach IN a subject area beyond my area of certification.

When I complained to FWISD Administrators about not being qualified to teach Science, I was simply told that I was qualified in connection therewith. Dr. O'Neal was disrespectful and rude to me and my counsel throughout these proceedings and consequently created a hostile atmosphere, thereby abridging all my right to a fair and impartial tribunal to hear my appeal, in violation of the Due Process Clause of the 14th Amendment of the United States Constitution.

/s/ HENRY S. DOOLEY
Henry S. Dooley, Affiant

THE STATE OF TEXAS §

COUNTY OF TARRANT §

I, the undersigned, state under oath that I am the Affiant in the foregoing Affidavit, that I have personal knowledge of the facts and allegations stated in it, and they are true and correct.

/s/ HENRY S. DOOLEY
Henry S. Dooley, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public, on the 10th day of October, 1985.

/s/ DEBORAH FORTRESS
Notary Public in and for
the State of Texas

Commission expires: 5-16-89

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. CA-4-85-084-E

HENRY S. DOOLEY

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT

(Filed February 5, 1985)

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

I.

Jurisdiction is conferred upon this Court by 42 U.S.C. § 2000(e)(5)(f) and by 28 U.S.C. § 1343, 42 U.S.C. § 1983, and the 14th Amendment of the U. S. Constitution.

Jurisdiction is also conferred pursuant to 42 U.S.C. § 2000e - § 2000e-17 as hereinafter more fully appears.

II.

(a) Plaintiff, HENRY S. DOOLEY, is a Black citizen of the United States and a resident of Fort Worth, Tarrant County, Texas. Plaintiff is a veteran teacher and former coach in the Fort Worth Independent School District.

(b) The Defendant, Fort Worth Independent School District (hereinafter FWISD) is a school district chartered and organized under the laws of the State of Texas for

the public education of the citizens of Fort Worth, Texas. Said Defendant is located and conducts its activities within the Northern District of Texas, and is an employer within the meaning of 42 U.S.C. § 2000(e)(b). The said Defendant is further engaged in an industry affecting commerce and employs more than fifteen (15) persons.

III.

(a) Within one hundred eighty (180) days of the occurrence of the acts of which he complains, charges of retaliation for opposing discriminatory practices were filed with the Equal Employment Opportunity Commission (EEOC) by Plaintiff herein on or about March 21, 1984 against the herein named Defendant.

(b) On or about November 26, 1984 Plaintiff received a "Notice of Right to Sue" from the office of the EEOC entitling him to institute a civil action in the appropriate Federal District Court within ninety (90) days of the date of receipt of said notice. This suit is brought within the said ninety (90) day period.

IV.

(a) Plaintiff began working for Defendant in 1967 as a teacher/coach and worked there continuously in such capacity until he was fired from coaching duties on or about October 7, 1983. Plaintiff would further show that on or about March 8, 1984, he was reassigned by Defendant to perform menial, non-teaching duties in Defendant's Transportation Department at longer than normal working hours.

(b) Plaintiff would further show that he filed a charge of discrimination against Defendant FWISD in 1979 and a second charge of discrimination was filed against this Defendant in 1981. Subsequent thereto, your Plaintiff

was relieved of his coaching duties by Defendant, and thereafter removed from his teaching position in physical education and reassigned to the Transportation Department as mentioned hereinabove.

V.

Plaintiff would further show that as a tenured teacher/coach he was unlawfully terminated from his coaching duties and placed in Defendant's Transportation Department in violation of State law and the due process clause of the 14th Amendment of the United States Constitution.

Your Plaintiff would further show that Defendant follows a policy and practice of discrimination of employment against Blacks on account of their race. Under such policy and practice Defendant, through its agents, repeatedly harassed, demoted, transferred, reassigned and ultimately terminated Plaintiff because Plaintiff attempted to obtain equal opportunity employment for himself, and because he filed charges of discrimination with the Equal Employment Opportunity Commission. As a direct and proximate result of this systematic and repeated harassment, and related conduct complained of herein, Plaintiff endured mental suffering.

VI.

Your Plaintiff would show that at all times complained of herein, Defendant acted through its agents and/or servants and under color of law.

VII.

The discrimination complained of above is and has been of a continuing nature. Plaintiff, Henry S. Dooley, has suffered or will suffer loss wages in the excess of $10,000 by reason of Defendant's discriminatory conduct in deny-

ing him equal opportunities for employment on account of his race, and in retaliating against Plaintiff for pursuing charges of discrimination under 42 U.S.C. § 2000(e) et seq. The injury to Plaintiff is such that there is no adequate remedy at law.

VIII.

Plaintiff, Henry S. Dooley has contracted with DONALD J. FLEMING, a duly licensed practicing attorney in Fort Worth, Tarrant County, Texas to prosecute his claim for loss wages and damages, and in that connection has agreed to pay this attorney a reasonable attorneys fee for his services and representation.

WHEREFORE, Plaintiff respectfully prays that this court advance this case on the court's docket and order a hearing on said cause at the earliest practicable date, that Plaintiff have judgment for his loss wages and damages, for reasonable attorneys fees, costs of court, for a permanent injunction enjoining defendant from further unlawful, discriminatory employment practices, and for such other and further relief as he may show himself entitled both in law and in equity.

Respectfully submitted,

SALVANT & FLEMING
610 E. Weatherford Street
Fort Worth, Texas 76102
817/335-1043

By: /s/ DONALD J. FLEMING
Donald J. Fleming
State Bar No. 07122500
Attorneys for Plaintiff

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4-79-386-K

HENRY S. DOOLEY

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT

(Filed July 27, 1984)

JUDGMENT

After a full trial on the merits before the Court and in accordance with the Memorandum Opinion entered on this date, it is ORDERED and ADJUDGED that Plaintiff Henry S. Dooley take nothing, that all claims asserted against Fort Worth Independent School District be dismissed on the merits, and that each party bear its own costs.

IT IS SO ORDERED.

SIGNED this 27th day of July, 1984.

/s/ DAVID O. BELEW, JR.
David O. Belew, Jr.
United States District Judge

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4-79-386-K

HENRY S. DOOLEY

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT

(Filed July 27, 1984)

MEMORANDUM OPINION

The Case

This complaint was brought by the Plaintiff, Henry Dooley, against the Defendant, Fort Worth Independent School District (FWISD), alleging that because of his race (black) he has been intentionally discriminated against by the Defendant with regard to job promotions and demotions within the FWISD system. Plaintiff has alleged causes of action under the Fourteenth Amendment and under 42 U.S.C. §§ 1981, 1983, & 2000(e) et seq. ["Title VII"] and has prayed for declaratory and injunctive relief as well as for back wages.

Jurisdiction

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 & 1343.

Background

Plaintiff is a black citizen residing in Tarrant County, Texas. Defendant, FWISD, is an independent school district duly organized under the laws of the State of Texas and an employer within the meaning of 42 U.S.C. § 2000(e).

In August, 1967, Plaintiff, Henry S. Dooley, was employed by the Fort Worth Independent School District. The Plaintiff was employed as a teacher and received an additional assignment as a coach for which he was paid an extra stipend. In August, 1970, Plaintiff was employed by the Defendant school district under a continuing contract.

During the 1970-1971 school year, Plaintiff was assigned to teach at Trimble Technical High School ["Tech"] in the Defendant school district. Plaintiff was also assigned as an assistant coach at said high school. During his tenure at Tech, Plaintiff coached junior varsity and ninth grade sports including track and football.

In May, 1979, Dean Stacy, Tech's head coach, requested that the Plaintiff, Mr. Dooley, be reassigned. Reasons for this requested reassignment included Mr. Dooley's lack of interest in the job, his uncooperative attitude toward the other coaches on the Tech coaching staff, acts of insubordination, and his failure to follow the directives of his superiors at the high school.

During the summer of 1979, the Plaintiff was indeed replaced by Quinton Robinson (also black) and reassigned as head coach at Stripling Middle School.[1] This assignment was refused by Plaintiff and subsequently

1. Formerly known as Junior High School.

Mr. Dooley, in August of 1979, was assigned as a teacher and assistant coach at Meacham Middle School. Plaintiff's reassignment was in accordance with his contract of employment, which states in paragraph 4 that "the Superintendent of the Schools shall have the right to assign such duties to the Teacher as the Board shall deem proper, and may, from time to time, assign or reassign the Teacher to duties other than or additional to those contemplated hereunder" (Defendant's Exhibit No. 1).

Coach Stacy's request that Mr. Dooley be reassigned was first directed to the then athletic director, Mr. Lon Goldstein. Mr. Goldstein's investigation and recommendation was then passed to an associate superintendent, Jack Billingsley, who was then responsible for the athletic department. It was Mr. Goldstein's recommendation that Mr. Dooley be terminated from all coaching duties. Mr. Goldstein's recommendation was then addressed to the then superintendent, Dr. Gerald Ward, by Mr. Billingsley. It was the superintendent's decision that Mr. Dooley be reassigned to a different school rather than terminated.

Soon after this reassignment, Mr. Dooley applied for various head coaching jobs within the Defendant school district. In May of 1979, the Plaintiff applied for the head track coach's position at Eastern Hills High School. Plaintiff was not selected for this position and in September, 1979, he filed charges with the EEOC alleging racial discrimination. Plaintiff continued to apply for head coaching vacancies, and in each case another applicant was selected by the Defendant school district to fill the position. In July, 1981, Mr. Dooley again filed charges with the EEOC, alleging employment discrimination and retaliation. On February 22, 1982, the EEOC issued its determination on both complaints filed by the Plaintiff.

The EEOC held that after examination of the evidence, there was "not reasonable cause to believe the allegations to be true."

In the meantime, on September 5, 1979, upon complying with all administrative prerequisites, Plaintiff filed this lawsuit.[2]

The Title VII Claim

A plaintiff who alleges disparate treatment in an action under Title VII has the burden of persuading the trier of fact that the defendant has committed intentional discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Lincoln v. Board of Regents of Univ. System*, 697 F.2d 928, 936 (11th Cir. 1983). Although this ultimate burden of persuasion remains with the plaintiff at all times, the plaintiff may, by proving a prima facie case of disparate treatment, shift to the defendant the burden of producing evidence of nondiscriminatory intent. *Burdine* at 450; *Lincoln* at 937.

Although the case at bar is neither a pure Title VII "hiring" case, since Plaintiff has been employed by the FWISD since 1967, nor is it a pure Title VII wrongful discharge case, since Plaintiff has not been discharged by the FWISD, it bears some of the characteristics of both.

Under Title VII, the Plaintiff can establish a prima facie case for wrongful discharge or, in this case, reassignment from Tech to Meacham Middle School, by proving that: (1) he is a member of a protected minority; (2) he was qualified for his job; (3) he was discharged

2. An Amended Original Complaint was filed on May 24, 1982.

(demoted or reassigned); and (4) he was replaced by a member of an unprotected class. *See, e.g., Whiting v. Jackson State University*, 616 F.2d 116, 120 (5th Cir. 1980); *Marks v. Prattco*, 607 F.2d 1153, 1155 (5th Cir. 1979).

Here, it is undisputed that Quinton Robinson, also a black male, replaced Plaintiff at Tech when the Plaintiff was reassigned to Meacham Middle School.[3] Mr. Robinson is now the head football coach/athletic coordinator at Tech. This Court therefore holds that plaintiff has failed to establish a prima facie case for discrimination under Title VII with regard to Plaintiff's reassignment from Tech to Meacham Middle School.

However, even if the Plaintiff had not been replaced by another black male when he was reassigned to Meacham, the preponderance of the evidence shows that Plaintiff was reassigned on account of his insubordination, his uncooperative attitude, and his general failure to contribute to the overall program at Tech. The Court therefore concludes that Plaintiff's reassignment by the superintendent from Tech High School to Meacham Middle School was for legitimate, non-racial reasons.

As a further matter, the Court finds that Plaintiff was employed by the FWISD under a continuing contract as a *teacher* as there are no contracts to *coach* in the FWISD. Under the specific terms of the contract, Plaintiff was subject to assignment by the superintendent and had no contractual or property right to any extra stipend as a

3. As stated earlier, Plaintiff was initially reassigned to the head coaching job at Stripling Middle School but refused to accept the assignment. Consequently, the school district reassigned him to the next available position, that of assistant coach at Meacham Middle School.

coach. Therefore, Plaintiff can have no procedural due process claim for loss or reduction of the coaching stipend because he had no entitlement to such coaching stipend unless he was so assigned. Any such assignment is subject to reassignment at the pleasure of the superintendent.

Since his reassignment, Plaintiff has applied, in each case unsuccessfully, for various other coaching positions in the FWISD as those positions became vacant.

In May, 1979, Plaintiff applied for the head track coach's position at Eastern Hills High School and was denied same. In January, 1981, Plaintiff applied for the head football/athletic coordinator's position at Western Hills High School and was denied same. Plaintiff also applied unsuccessfully for coaching positions at Carter-Riverside High School, O. D. Wyatt High School, Diamond Hill-Jarvis High School, Southwest High School, Paschal High School, and then again at Diamond Hill-Jarvis High School. Plaintiff has alleged that he was denied these positions because he is black and because of his discrimination claims filed with the EEOC.

To prove discrimination in a Title VII hiring case:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." [citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)] Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not

its true reasons, but were a pretext for discrimination [citing *McDonnell* at 804].

Burdine at 253.

Although the plaintiff's burden of "establishing a prima facie case of disparate treatment is not onerous," the ultimate burden of "persuading the trier of fact that the defendant intentionally discriminated against the Plaintiff remains at all times with the plaintiff." *Id.*

In order to establish a prima facie case, the Plaintiff must prove that he applied for an available position, for which he was qualified. "but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Id.* at 253. In this case, the elements to be established by a preponderance of the evidence in order to shift the burden of production are: (1) that Plaintiff belongs to a protected class; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973).

Applying *McDonnell Douglas* to the present case, the following is substantiated by the evidence. First, Plaintiff Dooley is black and consequently a member of a protected racial minority. Secondly, Plaintiff possessed at least the minimum paper qualifications required for every job within the FWISD for which he applied. Thirdly, Plaintiff applied unsuccessfully for several coaching positions for which the Defendant school district was accepting applications. Fourthly, the evidence established that

subsequent to each rejection of the Plaintiff, the Defendant continued to seek others to fill the positions or, perhaps more accurately, a decision as to who would ultimately be chosen to fill the vacant position was made sometime after Plaintiff and all other applicants had completed the application and interviewing process. The Court thus concludes that Plaintiff has established a prima facie case under Title VII for employment discrimination.

Once a prima facie case is established by the Plaintiff in a Title VII case, the burden of production shifts to the Defendant "to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine* at 254.

If the defendant carries this burden of production by clearly setting forth, "through the introduction of admissible evidence, the reasons for the plaintiff's rejection," (*Id.* at 255) then the plaintiff must demonstrate that the defendant's "proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Id.* The Plaintiff may succeed either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the "employer's proffered explanation is unworthy of credence." *Id.* at 256.

The evidence in this case shows that the FWISD has a fair, nondiscriminatory procedure for considering applicants for coaching vacancies. Each of these positions is

advertised and the minimum requirements for consideration are set forth in the advertisement. A cut off date is established for receiving written applications for each vacant position.

After all applications have been received, all applicants are fairly and impartially considered. In some instances all applicants are interviewed by the selection committee. In others, particularly where there are a large number of applicants, a screening process is followed whereby the top applicants are selected for an interview by the selection committee.

The superintendent designates three persons to serve on the selection committee and questions concerning each applicant's knowledge of the sport, the University Interscholastic League (UIL) Rules, and school district policies are agreed upon by the members of the committee prior to the interviews and are the same for each applicant.

Each member of the committee rates the applicant on a number of written criteria relating to the position to be filled. Each member, independently of the others, compiles a grade score. The grades are then added for a total score and the applicants are ranked based on that score. The selection committee then makes its recommendation which, ordinarily, is tantamount to selection.

In no instance was Plaintiff's score high enough to make him the top applicant for any of the positions for which he applied.

Several of the three-person selection committees which interviewed the Plaintiff contained black members. There is no evidence that the black members ranked the Plaintiff any higher than did the white members of the committees.

For example, with regard to the head track coach's position at Eastern Hills High School, the interview committee consisted of Gerald Beal (a black male), Lon Goldstein (a white male), and James Willingham (a white male). There were four applicants for the position —all except the Plaintiff were white males. All three committeemen gave Plaintiff a lower score than they gave any of the other three applicants (see Defendant's Exhibits 18, 19, 20 and 21).

Ultimately, Ronald Gerringer, who was given the highest score, was chosen for the head track coach's position at Eastern Hills High School. As Mr. Beal testified, Mr. Gerringer was selected over the other applicants for several legitimate, nondiscriminatory reasons including: Mr. Gerringer's past performance in the school district; his outstanding communication skills; his superior knowledge of track and field, the UIL Rules, and FWISD policies; and his experience as a track coach on the college level.

The Court also finds that the Defendant had legitimate, nondiscriminatory reasons for choosing other applicants over the Plaintiff with regard to the other positions for which the Plaintiff applied but was not selected.

In January, 1981, the Plaintiff, along with Wade Walker (a white male) and thirteen others, applied for the position of head football coach at Western Hills High School. The Associate Superintendent of FWISD, Dr. James Bailey (a white male), testified that Wade Walker was selected over the other applicants to be the head football coach at Western Hills High School because: he had previous experience as a head football coach in the FWISD; he showed greater enthusiasm and interest in the

position than the other applicants; he had prior experience as a head track coach with FWISD; he responded well to questions and knew the UIL Rules very well.

In March, 1981, Plaintiff, along with Bill Calder (a white male) and others, applied for the head football coach/athletic coordinator position at Carter-Riverside High School. The selection committee, which consisted of Principal Jack Bass (a white male), Dr. James Bailey, and then FWISD Athletic Director Lon Goldstein (a white male), recommended Mr. Calder and he was subsequently selected. The reasons for Mr. Calder's selection included: his experience as a first assistant, varsity level football coach at Carter-Riverside and Southwest High Schools; his apparent enthusiasm and interest in the job; and his knowledge of football and UIL Rules.

In April, 1981, Plaintiff, along with Roy Burrell (a white male) and others, applied for the position of head football coach/athletic coordinator at Diamond Hill-Jarvis High School. The committee, which consisted of Principal Homer Ludiker (a white male), Dr. James Bailey, and Mr. Lon Goldstein, selected Mr. Burrell for that position and the Superintendent approved his nomination and assignment. The reasons articulated for Mr. Burrell's selection included his leadership capabilities and enthusiasm for the job, his outstanding knowledge of the UIL Rules, and his experience on the varsity football level as a defensive coordinator at Sam Houston High School in the Arlington Independent School District.

In June, 1981, Plaintiff, along with Bob Freeman (a white male) and others, applied for the head track coach's position at Southwest High School. The committee, which selected Bob Freeman, consisted of Principal Glenn Man-

deville (a white male), Dr. James Bailey, Mr. Lon Goldstein, and the future Athletic Director Mr. Ronnie White (a white male) as a non-voting member. The reasons articulated for Mr. Freeman's selection included his superior responses to questions asked him during the interviews, and his experience as a baseball coach.

In July 1981, Plaintiff, along with James Butler (a black male) and others, applied for the head track coach's position at Trimble Tech High School. Mr. Butler was selected by the committee and his assignment was approved by the Superintendent.

In April, 1982, Plaintiff, along with Mike Moffett (a white male) and others, applied for the head football coach/athletic coordinator's position at Diamond Hill-Jarvis High School. The interview committee, who selected Mr. Moffett, consisted of Principal Homer Ludiker, Dr. James Bailey, and Mr. Ronnie White. The reasons for Mr. Moffett's selection included his outstanding responses to the questions asked him; his competence in filling in for the head coach when that coach was absent during the preceding school year; and his experience as first assistant to the vacating head football coach on the varsity level.

In 1983, Plaintiff applied unsuccessfully for the head basketball coach's position at Paschal High School. The committee selected Mr. Walter Dansby (a black male).

The Court acknowledges that under the FWISD method of selection, there is no way to absolutely guarantee that a particular selection was completely untainted by racial prejudice. However, the Court finds that the preponderance of the evidence in this case indicates that Mr. Dooley's rejections were not so motivated. *Id.* at 927.

Since the Plaintiff has failed to carry his burden under Title VII, "likewise, he has not acquitted the burden imposed by § 1981." *Id.*

Similarly, 42 U.S.C. § 1983 provides no substantive rights, only a remedy. *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 617-18 (1979). Thus, Mr. Dooley's right "does not emanate from § 1983, but rather from the Equal Protection clause of the 14th Amendment." *Nilsen v. City of Moss Point, Miss.,* 701 F.2d 556, 559 n.3 (5th Cir. 1983). The Fifth Circuit has held that "when § 1983 is used as a parallel remedy with Title VII in a discrimination suit, the elements of the substantive cause of action are the same under both statutes." *Rivera v. City of Wichita Falls,* 665 F.2d 531, 534 n.4 (5th Cir. 1982). *See also Pouncy v. Prudential Insurance Company,* 668 F.2d 795, 797 n.3 (5th Cir. 1982).

Hence, the Court concludes that Plaintiff's Fourteenth Amendment and § 1983 claims should be dismissed as well.

Conclusion

Plaintiff has failed to establish a prima facie case for disparate treatment with regard to his reassignment from Tech High School to Meacham Middle School. With regard to the positions for which he unsuccessfully applied, Plaintiff has not carried his burden of proving that the reasons articulated by the school district for selecting other applicants over the Plaintiff were pretextual or that the Plaintiff's failed efforts were the result of retaliation by the Defendant. Thus, Plaintiff has failed in his ulti-

mate burden to persuade the Court that he was the victim of purposeful discrimination.

Accordingly, Plaintiff's prayer for relief is in all things denied.

SIGNED this 27th day of July, 1984.

/s/ DAVID O. BELEW, JR.
David O. Belew, Jr.
United States District Judge

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-1021

HENRY S. DOOLEY,
Plaintiff-Appellant,

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT,
Defendant-Appellee.

APPELLANT'S PETITION FOR REHEARING

TO THE JUDGE OF THE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW the Appellant, Henry S. Dooley and files this Petition for Rehearing pursuant to Federal Rules of Appellate Procedure, Rule 40 in the above entitled and numbered cause.

I.

In this Court's January 17, 1989 Opinion, the Court found that there was not liberty or property interest in a classroom assignment. Therefore, no due process rights were implicated in the Defendant School District's transfer of Plaintiff Dooley to a non-teaching assignment in the Transportation Assignment. The Court based its finding on Plaintiff's employment contract. Attached hereto as Exhibit "A" is the contract in which Plaintiff Dooley's contractual rights are outlined. (Plaintiff's Exhibit No.

20) A reading of the total contract makes clear that Plaintiff Dooley was employed as a Teacher. In paragraph 1, the contract states that Dooley is employed for "classroom instruction of academic subjects". Plaintiff Dooley is consistently referred to as the "Teacher". Even in paragraph 4 referenced by the Court as a basis for empowering the Superintendent to reassign Plaintiff to additional or other duties, Plaintiff is still referred to as "Teacher". Paragraph 8 states that in circumstances involving discharge, dismissal and a return to probationary status, Chapter 21, Subchapter G of the Texas Educational Code is to govern the rights, duties, responsibilities and requirements of both the Board and the Teacher. Subchapter G of the Chapter 21 is entitled "Teachers Employment Contracts". For this Court to hold that Plaintiff's reassignment to a non-teaching position is consistent with the continuing teacher contract used by the Fort Worth Independent School District is to give unlimited power to the Superintendent. Could the Superintendent reassign a master teacher with a doctorate in mathmatics to a janitorial position without due process? Could the Superintendent reassign the master teacher for only a few months, or two years without due process? Is the amount of time involved in the transfer in any way implicated in the paragraph 4 assignment language? Plaintiff Dooley would assert that the answer to each of the questions is "no". In *Johnson v. San Jacinto Jr. College,* 498 F.Supp. 555 (S.D. of Texas—1988), a frequently cited school law case, the District Court held that a demotion is any reassignment under which the staff member receives less pay or *has less responsibility* than under the assignment he previously held. 498 F. Supp. at 567 citing *Singleton v. Jackson Municipal Sepa-*

rate School District, 419 F.2d 1211, 1218 (5th Cir. 1969) (per curiam), rev'd on other grounds and remanded sub nom., *Carter v. West Feliciana School Board*, 396 U.S. 290, 90 S. Ct. 608, 24 L.Ed.2d 477 (1970) (per curiam). The central value to be protected in responsibility; salary and title are not necessarily determinative. *Lee v. Russell County County Board of Education*, 563 F.2d 1159, 1161 (5th Cir. 1977). The Court went further to state the following:

> This Court is aware that "the strict requirements of Singleton [are not applicable] in the absence of desegregation related reductions [in school staff]." *Pickens v. Okolona Municipal Separate School District*, 527 F.2d 358 (5th Cir. 1976). *See Lee v. Tuscaloosa County Board of Education*, 591 F.2d 324 (5th Cir. 1979) (per curiam). Desegregation related reductions are not involved in the instant cause; however, in order to determine whether plaintiff was deprived of procedural or substantive due process, the Court must determine whether plaintiff's reassignment to history teacher was a demotion. The Court concludes that plaintiff had fewer responsibilities as a teacher, and that his performing as a teacher required a lesser degree of skill than the position of Registrar which he previously had held.

Plaintiff Dooley has also attached as Exhibit "B" the job duties he performed while in the Transportation Department. (Defendant's Exhibit No. 22.) Clearly, Dooley had less responsibility under the *Johnson v. San Jacinto* test.

Moreover, the Court alludes to Mr. Dooley's misconduct as justification for his transfer to a non-teaching assignment. As Plaintiff's counsel pointed out in oral

argument and in his brief, the Board of Trustees did not terminate Plaintiff's teaching contract. (See Plaintiff's Exhibit No. 4, attached hereto as Exhibit "C".) The punishment for Plaintiff's misconduct was his transfer to another school and eliminating any coaching stipend or responsibilities for Dooley. For this Court to engraft additional punishment which was not contemplated by the Board of Trustees is clearly outside of any reasoning offered even by the District Court in this Opinion.

In light of the above, Plaintiff Dooley would request this Court to grant Plaintiff's Petition for Rehearing.

Respectfully submitted,

HILL HICKS COLLINS

/s/ DONALD W. HILL
Donald W. Hill
Bar Card No. 09628400
1201 Main Street
One Main Place - Suite 1530
Dallas, Texas 75202
(214) 744-0255

CERTIFICATE OF SERVICE (Omitted)

APPENDIX

EXHIBIT A

CONTRACT OF EMPLOYMENT

(Continuing)

This contract entered into by and between the Board of Education of the Fort Worth Independent School District, hereinafter called the Board, and Henry S. Dooley, hereinafter called the Teacher.

WITNESSETH:

1. The Board hereby agrees to employ the Teacher, and the Teacher hereby agrees to serve the Board by engaging in classroom instruction of academic subjects as assigned by the Superintendent of Schools for ten months each school year for the period commencing on the 24th day of August, 1970, and continuing for all future school years, without the necessity for annual nomination or reappointment, until such time as the Teacher: (1) resigns or retires under the Teacher Retirement system; (2) is released from employment by the Board at the end of a school year because of necessity reduction of personnel; (3) is discharged for lawful cause, as hereinafter set forth, and pursuant to the procedures hereinafter set forth; (4) is dismissed at the end of a school year for any reason as hereinafter set forth, and pursuant to the procedures hereinafter set forth; (5) is returned to probationary status as hereinafter set forth.

2. The Board hereby agrees to pay to the Teacher, for the services rendered by the Teacher pursuant to this contract, the sum of $9819 for the school year 1970-71.

For each school year thereafter during the life of this contract said annual salary for each school year shall be that authorized by the approved salary schedule of the school district. Such annual salary for each school year shall be paid in 12 monthly installments. The Teacher shall receive 1/190th of his annual salary for each day present on school days and shall have 1/190th of his annual salary deducted for each day absent, except as provided by Section 4.11 of the Administrative Policies of the school district.

3. The Teacher agrees that before this contract shall become effective, there shall be furnished to the Board, at the Teacher's expense, the following items: (1) a certified copy of the Teacher's birth certificate; (2) a valid and appropriate certificate to teach in the public schools of Texas; (3) a report by a licensed physician on a form supplied by the Employer showing the results of a physical examination of the Teacher by such physician within the past three months and including a statement by such physician that the Teacher is physically able to carry out the duties of his or her position; (4) a certificate signed by a physician licensed to practice medicine in Texas showing that the Teacher is free of tuberculosis as evidenced by a negative chest X-ray or a negative tuberculin skin test; and (5) a certificate signed by a licensed physician showing that the Teacher has been vaccinated against smallpox less than seven years prior to the date of this contract or a certificate showing that the Teacher has had smallpox. The certificates relating to tuberculosis and smallpox shall be annual requirements.

4. It is understood and agreed by the parties to this agreement that the Superintendent of Schools shall have the right to assign such duties to the Teacher as the Board

shall deem proper, and may, from time to time, assign or reassign the Teacher to duties other than or additional to those contemplated hereunder.

5. It is understood and agreed by the parties that the Teacher shall teach to the best of his skill and ability, and shall be governed by and discharge the duties required by the school laws of this State, and such local policies, rules, and regulations as are in effect at this time or may be adopted by the Board during the life of this contract, such laws, policies, rules, and regulations being expressly made a part of this contract.

6. The Teacher may be released at the end of the school year and his employment with the Board terminated at that time, or the Teacher may be returned to probationary contract employment for no more than the three succeeding school years upon notice and hearing, if requested, as hereinafter provided, for any reason enumerated in Section 21.209, Texas Education Code, relating to Discharge for Cause, or for any of the following additional reasons; (1) inefficiency or incompetency in performance of duties; (2) failure to comply with such reasonable requirements as the Board may prescribe for achieving professional improvement and growth; (3) willful failure to pay debts; (4) habitual use of addictive drugs or hallucinogens; (5) excessive use of alcoholic beverages; (6) necessary reduction of personnel by the school district (such reduction shall be made in the reverse order of seniority in the specific teaching fields); (7) for good cause as determined by the Board, good cause being the failure of a teacher to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts throughout the State of Texas.

7. The Teacher may be discharged and salary payments terminated by the Board during the school year for one or more of the following reasons, which shall constitute lawful cause for discharge: immorality, conviction of any felony or other crime involving moral turpitude, drunkenness, repeated failure to comply with official directives and established school board policy, physical or mental incapacity preventing performance of the contract of employment, repeated and continuing neglect of duties, and misuse of any leave policy.

8. Before the Teacher shall be discharged during the year for any of the causes set forth in the preceding section of this contract, or before the Teacher shall be dismissed at the end of a school year, or before the Teacher is returned to probationary contract status, the Teacher shall be notified in writing by the Board or under its direction, of the proposed action and of the grounds assigned therefor. In the event of action taken under this section of this contract the rights, duties, responsibilities, and requirements of both the Board and the Teacher shall be controlled by the provisions contained in Subchapter G, Chapter 21, of the Texas Education Code, and any amendments made thereto, such provisions being deemed a part of this contract as if fully set forth herein.

9. The Teacher may relinquish his position and leave the employment of the Board at the end of any school year by written resignation addressed to and filed with the Board prior to the first day of August preceding the end of the school year that resignation is to be effective. A written resignation mailed by prepaid certified or registered mail to the Superintendent of Schools of the

district at the post office address of the district shall be considered filed at the time of mailing.

10. The delivery of this contract to the Teacher shall constitute notice by the Board to the Teacher of the Teacher's election to continuing contract status with the Board. Within 30 days after the receipt of this contract the Teacher shall file with the Board notification in writing of his or her acceptance of the continuing contract. The filing of this contract, signed by the Teacher, with the Board shall be deemed as notification of acceptance of the contract by the Teacher. Failure of the Teacher to accept the contract within such 30 days period shall be considered a refusal on the part of the Teacher to accept the contract.

Accepted by:

/s/ HENRY S. DOOLEY
Teacher

Recommended by:

/s/ JULIUS TRUELOVE
Superintendent of Schools

Approved by:

Board of Education of Fort Worth
Independent School District

/s/ LAUREL L. TURNER
President of Board

Note: Sign both copies of contract; retain one copy for your files; return the other copy to:

Personnel Department
Fort Worth Independent School District
3210 West Lancaster
Fort Worth, Texas 76107

EXHIBIT B

Transportation Department

March 8, 1984

Special Assignment

To: Mr. Henry Dooley

From: Joe C. Young,
Director of Transportation

8:00 a.m.—4:30 p.m. (30 minute lunch)

1. Inspect buses at Clark Field and West Side for cleanliness and damage. Make report to lot supervisor.
2. Check and update the tool inventory for shop owned tools at North Side, West Side, and Clark Field.
3. Transport parts between North Side, West Side, and Clark Field.
4. File purchase orders, invoices and gasoline sheets.
5. Assist in the completion of the district vehicle inventory for maintenance vehicles.
6. Assist in the movement of transportation offices and shops to the new Clark facility.
7. Sorting and listing surplus transportation items for auction.
8. Transporting surplus items for auction.
9. Make emergency trips to warehouse, vendors, and purchasing.
10. Other duties as assigned by Director or Manager of Maintenance.

EXHIBIT C

FORT WORTH BOARD OF EDUCATION
3210 West Lancaster
Fort Worth, Texas 76107
(817) 336-8311

CERTIFIED MAIL
P 593 089 897

February 29, 1984

Mr. Henry S. Dooley
P. O. Box 6686
Fort Worth, Texas 76115

Dear Mr. Dooley:

On Tuesday, February 28, 1984, the Fort Worth Independent School School District Board of Education met to consider your appeal of the Administrative Hearing Panel's recommendation. The recommendation of said panel was that you be relieved of all coaching duties based upon charges that you:

(a) Used excessive physical force upon a student athlete,

(b) Used unreasonable force to discipline and/or enforce compliance with instructional requests.

The recommendation of the Administrative Hearing Panel, together with the transcript and exhibits presented at such hearing held November 15, 1983, were submitted to the Board of Education at a special hearing on Tuesday, February 28, 1984.

The Board of Education, having fully reviewed the record and exhibits and considered your appeal, is of the opinion that the charges against you are substantiated by the evidence and that the recommendation of the superintendent and the action of the hearing panel should be upheld and your appeal denied.

The board, by vote of five (5) in favor, one (1) against, and three (3) not voting due to their absence from the hearing, specifically finds:

1. That you did, in fact, use excessive and unreasonable physical force upon an eighth grade student by tackling said student on or about October 7, 1983.

2. That the physical force used by you was so excessive and unreasonable that it violated the policies of the Fort Worth Independent School District and the Athletic Handbook.

3. That the Board of Education of the Fort Worth Independent School District finds that you should:

   (a) Be removed from all coaching responsibilities within the school district.

   (b) That the coaching stipend received by you within the district be terminated as of February 29, 1984.

   (c) That you be transferred from Meacham Middle School.

Accordingly, you are hereby officially notified that at the special hearing of your appeal on Tuesday, February 28, 1984, the Board of Education of the Fort Worth Independent School District ordered that your appeal be denied

and that you be relieved of all coaching duties and reassigned and that your coaching stipend be discontinued as of Wednesday, February 29, 1984, which is the effective date of your termination as coach with the Fort Worth Independent School District.

You are hereby further notified that you have a legal right to appeal from said decision of the Board of Education by filing a written notice of appeal to the Commissioner of Education within thirty (30) days from the date the decision of the Board of Education was communicated to you and otherwise complying with the Texas Education Agency Rules and Procedures for such appeals as set forth in Title 19 Texas Administrative Code, Section 61.251 and following.

Yous truly,

/s/ H. RICHARD O'NEAL
H. Richard O'Neal
President

cc: Donald J. Fleming, Attorney (Certified Mail No. PO7 3772842)
Tom Carr, Attorney
Carl Candoli, Superintendent
T. C. Wallace, Jr., Assistant Superintendent

Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRY S. DOOLEY,
Petitioner,

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT and
H. RICHARD O'NEAL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief in Opposition To Petition For Certiorari

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No. 88-1687

In The

Supreme Court of the United States

October Term, 1988

Henry S. Dooley,
Petitioner,

v.

Fort Worth Independent
School District and
H. Richard O'Neal,
Respondents.

Petition for Writ of Certiorari To The
United States Court of Appeals for the Fifth Circuit

Brief in Opposition to Petition for Certiorari

TO THE HONORABLE JUDGE OF SAID COURT:

The Respondents Fort Worth Independent School District and H. Richard O'Neal respectfully pray that the writ of certiorari be denied.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit, filed January 17, 1989, is unreported and is reprinted as Appendix D to the Petition for Writ of Certiorari at Pages 16a and 17a.

The opinion of the United States Court of Appeals for the Fifth Circuit On Motion for Rehearing filed February 13, 1989, is unreported, and is reprinted as Appendix B to the Petition for Writ of Certiorari at Page 13a.

The opinion of the District Court filed on December 9, 1987, is reported at 686 F. Supp. 1194 (N.D. Tex. 1987), and is reprinted as Appendix F to the Petition for Writ of Certiorari at Pages 20a through 36a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of laws; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42 §1983.

> Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Code Title 42 §2000e-2(a)(1)

> (a) Employer practices. It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

QUESTIONS PRESENTED

I

Whether the Court of Appeals erred in holding that, on oral argument, this appeal was narrowed to the sole issue of whether Petitioner was denied due process where, after a disciplinary hearing that complied with due process, Petitioner was temporarily assigned to the transportation department rather than to another classroom.

II

Whether Petitioner was denied due process when, after a disciplinary hearing that complied with due process, Petitioner was temporarily assigned to the transportation department

pending the opening of a classroom assignment, where Petitioner was afforded the opportunity to contest or grieve such temporary assignment, where Petitioner's employment contract provided for assignment to positions other than teaching, where Petitioner was given a classroom assignment as soon as one was available.

III

Whether, even if it should be held that the Court of Appeals erred in holding that Petitioner's retaliation claim was no longer an issue on this appeal, the District Court's finding that there was no retaliation based on the correct legal standard.

IV

Whether, even if it should be held that the Court of Appeals erred in holding that Petitioner's jury claim was no longer an issue of this appeal, the District Court erred in refusing Petitioner's demand for a jury trial.

STATEMENT OF THE CASE

I

Coaching Assignment Termination

The Board of Trustees terminated Petitioner from his coaching assignment on February 28, 1984, after a due process hearing in which they found he had violently and without provocation tackled an eighth grade student. (Appendix M to Petition for Writ of Certiorari Exhibit C, p. 90a)

Petitioner had a hearing before an impartial panel and was represented by his attorney. The panel voted unanimously to recommend to the Board that Petitioner be relieved of his coaching assignment. After further hearing before the FWISD

Board of Trustees, the Board voted to terminate Petitioner's assignment as a coach upon findings that he used excessive and unreasonable force on a student. The Board directed the superintendent to remove Petitioner from the school where the tackling episode took place.

II

Temporary Assignment to Transportation Department

Pursuant to the Board of Trustee's order, Petitioner was removed from the school and was temporarily assigned to the transportation department pending an opening in a teaching field for which Petitioner was certified to teach. No such openings were available at this time. Petitioner was fully paid as a teacher during this temporary placement.

III

Teaching Termination

As soon as a teaching assignment was available, Petitioner was assigned to teach sixth grade science, a course in which he was certified to teach.

Petitioner's teaching was deficient in almost all respects, despite considerable assistance from school administrators. Accordingly, Petitioner was notified in writing of the school district's intent to terminate his employment as a teacher at the end of the school year. The notice set out ten reasons for termination and advised Petitioner of his right to a pretermination hearing before the Board of Trustees.

At the hearing Petitioner was afforded full due process including representation by his attorney, the right to cross-examine witnesses and to present evidence and argument. At the conclusion of the hearing the Board voted to terminate his employment as a teacher, and Petitioner filed suit.

While Petitioner initially raised various issues on this appeal, as stated in the per curium opinion of the Court of Appeals, Petitioner at oral argument narrowed his issues to one. Whether Petitioner was denied due process in connection with the temporary assignment to the transportation department. Accordingly, there is no issue on this appeal as to Petitioner's claim of retaliation or his claim of trial court abuse of discretion by the trial court in denying his demand for jury trial.

SUMMARY OF THE ARGUMENT

I

The Court of Appeals held that at oral argument this appeal was narrowed to the sole issue of Petitioner's due process claim respecting his temporary assignment to the transportation department. Notwithstanding such holding, Petitioner continues to urge retaliation and jury issues. Petitioner's brief does not suggest any basis for setting aside the Court of Appeal's finding as to the sole issue; he simply ignores the point altogether. Accordingly, we submit that there are no retaliation or jury issues to be considered by this Court.

II

The sole issue is whether Petitioner was denied due process when he was temporarily assigned to the transportation department pending the availability of a classroom teaching assignment.

Petitioner was reassigned for misconduct after a due process hearing. (Appendix D, p. 17a; Appendix F, pp. 23a-24a) The assignment to the transportation department was temporary, pending the availability of a classroom teaching assignment in a subject in which Petitioner was qualified to teach. (Appen-

dix F, p. 24a) Petitioner was afforded the opportunity to contest or grieve such temporary assignment. (Appendix F, p. 25a) Petitioner's employment provided for assignment to positions other than teaching. (Appendix D, p. 17a; Appendix F, pp. 24a-25a; Appendix M, Exhibit A, pp. 84a-85a) Petitioner was paid his full teacher's salary. (Appendix F, p. 24a) Petitioner was given a teaching assignment as soon as one was available. (Appendix F, p. 26a)

The District Court's findings in the above respects were based on undisputed evidence. Accordingly, it is clear that Petitioner was afforded due process meeting the Constitutional standards required by the Fourteenth Amendment. This assumes *arguendo*, without admitting, that Petitioner had a liberty or property interest in a specific *assignment*, as distinguished from his admitted property right in continued *employment*. Petitioner's position is groundless and frivolous. Certiorari should not be granted.

III

Petitioner claims that this reassignment was motivated by race discrimination and was retaliatory. Even if it should be held that the issue is in this appeal, it should be resolved against Petitioner. The District Court followed the familiar standards lain down in *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 93 Sup.Ct. 1817, 37 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 Sup.Ct. 1089, 67 L.Ed.2d 207 (1981).

Respondent proved that the reason for Petitioner's reassignment was his misconduct in tackling an eighth grade child, and the reason for temporarily assigning him to the transportation department was that there were no openings for a classroom teaching assignment. Petitioner offered no evidence that

the reasons advanced by the school district were mere pretext to cover up retaliation and discrimination motives. The District Court found that Petitioner failed to establish his claim of retaliation and discrimination. The District Court followed the correct process of analysis, and its findings were based on undisputed evidence. Accordingly, the denial of Petitioner's retaliation and discrimination claims must be affirmed.

IV

The Petitioner claims that the District Court abused its discretion in refusing to grant him a jury trial. Even if it should be held that such issue is presented on this appeal, it should be resolved against Petitioner. It is barely mentioned in Petitioner's brief and is not supported by any argument or authority.

Petitioner's jury demand was untimely under Rule 38(b), Federal Rules of Civil Procedure. The Rule provides that failure to make a timely jury demand constitutes a waiver. Moreover, Petitioner's claims were equitable in nature. Petitioner was not entitled to a jury trial of equitable issues. Finally, Petitioner did not file a notice of appeal from the District Court's order denying jury trial. Accordingly, the District Court did not abuse in its discretion.

ARGUMENT

I

The holding of the Court of Appeals that the issue of Petitioner's due process claim is the sole issue on this appeal is not error.

The Court of Appeals held:

> [A]t oral argument this appeal was narrowed to the sole issue of whether plaintiff was denied due process when

> the Fort Worth Independent School District, after a disciplinary hearing that complied with due process, assigned him to the transportation department rather than to another classroom assignment. (Appendix D, p. 17a)

Petitioner's brief does not show any basis for setting aside such holding by the Court of Appeals. Accordingly, Respondent submits that the due process issue is the only issue properly submitted to this Court.

II

Petitioner's temporary assignment to the transportation department pending the availability of a classroom teaching assignment, following the school board's order for reassignment after a due process hearing in which Petitioner was convicted of violence on a child, was not a denial of due process.

Petitioner has conceded that he was afforded due process when he was terminated from coaching because he violently tackled a young child during football practice. The school board ordered that Petitioner be reassigned.

In light of the uncontroverted evidence at trial, the District Court found:

> Plaintiff was notified of his temporary assignment to the transportation department. Further, Plaintiff was provided the opportunity to contest or grieve his temporary assignment with the Superintendent of Schools. Plaintiff failed to request any further hearing or appeals after he and his representative discussed his reassignment with The Superintendent of Schools. (Memorandum opinion, Appendix F, p. 25a)

Petitioner appealed both the temporary assignment to transportation and his coaching assignment termination to the State Commissioner of Education. After a hearing wherein Petitioner was represented by counsel, the Commissioner found:

> 23. The Contract between the parties provides for reassignment of the teacher.
>
> 24. Petitioner was transferred, pursuant to the Board's order on March 8, 1984, to Respondent's transportation department. He had no teaching assignment and no student related responsibilities.
>
> 25. The Petitioner was transferred to the transportation department because there were no teaching vacancies available within the district when the transfer was ordered.
>
> 26. Petitioner transfer was temporary and was effective only until the end of the 1983-84 school year. (Memorandum Opinion, Appendix F, pp. 25a-26a)

While Petitioner had a Fourteenth Amendment property right to continued employment, unless terminated after being afforded due process, he did not have a liberty or property right in any particular assignment. His employment contract provided:

> It is understood and agreed by the parties to this agreement that the Superintendent of Schools shall have the right to assign such duties to the Teacher as the Board shall deem proper, and may, from time to time, assign or reassign the Teacher to duties other than or additional to those contemplated hereunder. (Appendix M, Exhibit A, pp. 84a-85a)

Both the District Court and the Court of Appeals held that Petitioner's contract provided for assignment to positions other than teaching. (Appendix D, p. 17a; Appendix F, pp. 24a-25a)

Petitioner was paid his full teacher's salary during the time of his assignment to the transportation department (Appendix F, p. 24a), and Petitioner was given a teaching assignment as soon as one was available. (Appendix F, p. 26a).

Petitioner's reliance on *Carter v. West Feliciana School Board*, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970) and *Lee v. Russell County Board of Education*, 563 F.2d 1159 (5th Cir. 1977) is misplaced. The "demotion" theory has been limited to reassignments incident to desegregation plans and has no application to the facts of this case.[1] *Kelleher v. Flawn*, 761 F.2d 1079, 1087 (5th Cir. 1985)

Petitioner was not entitled to due process as to his specific assignment, but even if he was, it was clearly afforded him.

III

The District Court's finding that Respondent was not guilty of retaliation or discrimination was based on the correct legal standard and is supported by undisputed evidence.

Petitioner argues that his discharge was retaliatory. It is well settled that, in order to prevail in a claim of retaliation, Petitioner has the ultimate burden of proof and must first demonstrate a prima facie case. To establish a prima facie case, the Petitioner must show:

---

[1]Petitioner misstates the record in arguing that his duties in the transportation department included "greasing and inspecting," "manual labor," or any professionally demeaning duties. There is no evidence to support such contention.

1) That his activities were statutorily protected;
2) That an adverse employment action was taken against him; and
3) There was a causal link between the protected activity and the adverse employment action.
(*Lindsey v. Mississippi Research and Development Center*, 652 F.2d 488, 491 (5th Cir. 1981), *McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116 (5th Cir. 1983)).

Even if Petitioner establishes a prima facie case, Respondent must only "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Texas Department of Community Affairs v. Burdine*, 450 US 248, 254, 67 L.Ed.2d 207, 215 (1981).

Once Respondent has satisfied its burden by "explaining clearly the non-discriminatory reasons for its actions," the burden then shifts back to the Petitioner to prove that the reasons given by Respondent were merely a pretext for discrimination. *Burdine*, 450 U.S. at 256-257, 67 L.Ed.2d at 217-218.

The uncontroverted evidence demonstrates that Petitioner was terminated from his assignment as a coach for tackling an eighth grade child during football practice. Such an activity is not protected; therefore Petitioner has failed to establish even a prima facie case.

Even if it should be held that a prima facie case was established, it is undisputed that Respondent articulated legitimate, non-discriminatory reasons for terminating Petitioner's coaching assignment. Petitioner offered no evidence to show that the reasons given by Petitioner are "not its true reasons but were a pretext for a discrimination." *Burdine*, 450 U.S. at

254, 67 L.Ed.2d at 214, *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 804, 36 L.Ed.2d 679, 668 (1973).

Petitioner's retaliation complaint was investigated by both the EEOC and the Texas Commission on Human Rights. Both concluded that there was not "reasonable cause to believe the allegation is true." (Memorandum Opinion, Appendix F, p. 25a)

In summary, Petitioner failed to establish even a prima facie case of retaliation with respect either to Petitioner's removal from coaching or in the temporary assignment to the Transportation Department. However, even if a prima facie case were shown to exist, Respondent has articulated legitimate non-discriminatory reasons for Petitioner's transfer. The clear, uncontroverted testimony demonstrated that there were no teaching assignments available at the time of Petitioner's transfer.

As held by the District Court:

> Even assuming *arguendo* that Dooley has made out a prima facie case of disparate treatment, admittedly not an "onerous" burden, the School District has successfully met its burden of articulating a legitimate, non-discriminatory reason for Dooley's transfer to the Transportation Department. *Id.* at 253. Dooley was reassigned due to his misconduct in tackling an eighth grade student football player that failed to perform as desired by Dooley. Likewise, Dooley has failed to meet his burden of proving by a preponderance of the evidence that the reasons offered by the School District for his reassignment were false, or a mere pretext for discrimination. (Memorandum Opinion, Appendix F, p. 34a)

Petitioner's claim of retaliation and discrimination was properly addressed and correctly decided.

IV

The District Court's denial of jury trial was not an abuse of discretion.

On October 25, 1985, Petitioner filed his second of two complaints against respondent contending he was unlawfully terminated as a teacher and seeking reinstatement to his past positions.

On March 10, 1986, the Court signed an order setting the case for trial on April 13, 1987. Don Hill, attorney for plaintiff, filed his Appearance on June 6, 1986. However, it was not until March 5, 1987, one month prior to trial, that plaintiff filed a Motion for Leave to File Jury Demand.

Petitioner's demand for jury trial is untimely. (Rule 38(b) Federal Rules of Civil Procedure.) The last pleading directed to any issue triable to a jury, if any, was Respondent's answer filed on December 4, 1985. There was no request for jury trial in either of the two original complaints filed by Petitioner. As set out in Rule 38(d) FRCP, "failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) *constitutes a waiver by him of trial by jury.*" (emphasis added)

To wait fifteen months, then demand a jury trial one month prior to trial, is untimely and constitutes a waiver of trial by jury by Petitioner. *United States v. Unum, Inc.*, 658 F.2d 360, 303 (5th Cir. 1981); *United States v. Lochamy* 724 F.2d 494, 499 (5th Cir. 1984)

The Petitioner in his Motion for Leave to File Jury Demand and in his Brief in Support gave no justification for the lengthy delay; therefore there was no abuse of discretion on the part to the District Court in denying Petitioner's jury trial demand.

Rhodes v. Amarillo Hospital District, 654 F.2d 1148, 1154 (5th Cir. 1981)

Petitioner's amended complaint filed March 10, 1987 (one month prior to trial) raised no new issues and therefore should not allow a new opportunity to demand a jury trial. *Guajardo v. Estelle*, 580 F.2d 748, 752-753 (5th Cir. 1978). See also *McCorstin v. U.S. Department of Labor*, 630 F.2d 242, 244-245 (5th Cir. 1980)

Even if Petitioner had made a timely demand for a jury trial, he would not be entitled to a jury. Petitioner's central claim is that of the return of his job as a coach and teacher. His claims for reinstatement are equitable in nature. As such, Petitioner was not entitled to a jury trial. *Lynch v. Pan American World Airways, Inc.*, 475 F.2d (5th Cir.1973). "The imposition of monetary damages to make the employee whole for lost back-pay does not change the character of the proceedings and thereby mandate a jury trial." (citing *Harkness v. Sweeney Independent School District*, 427 F.2d 319 (5th Cir.1970) *Lynch* at 765).

There was no abuse of discretion exercised by the district court in denying Petitioner's demand for trial by jury.

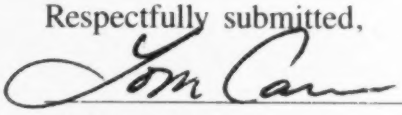
Furthermore, Petitioner did not file notice of appeal as to the order of the District Court denying the jury trial.

CONCLUSION

Petitioner was afforded full due process, and found guilty of tackling a student. Petitioner was removed from the school where the tackling event took place and was temporarily assigned to the transportation department, in that there were no teaching vacancies at that time. Petitioner's reassignment was pursuant to his employment contract. For the reasons set forth

herein, your Respondents respectfully submit that a writ of certiorari should not be granted in this case.

Respectfully submitted,



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